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## Articles

**Due Process Rights of Absent Parents in Interstate Custody  
Conflicts: A Commentary on *In re Marriage of Hudson***  
*Helen P. Garfield*

**Professional Team Sports New Legal Arena: Television  
and the Player's Right of Publicity**  
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*Irwin H. Warren*

## Notes

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## Due Process Rights of Absent Parents in Interstate Custody Conflicts: A Commentary on *In re Marriage of Hudson*

HELEN GARFIELD\*

Adjudications of custody necessarily involve the resolution of conflicts between parental rights and the best interests of children. In interstate custody battles, the parents' rights include the due process right to notice and the opportunity to be heard. In an era of increasing concern for parental rights, and for the rights of nonresident defendants generally, the danger exists that protection for the absent parent's rights may be extended at the expense of the children's welfare. The Uniform Child Custody Jurisdiction Act (UCCJA)<sup>1</sup> was designed primarily for the protection of children in interstate custody cases. The Act assures that a competent forum will always be available to decide child custody and that other states will enforce the decision, but the UCCJA does not require in personam jurisdiction over an absent parent or minimum contacts between the absent parent and the forum.<sup>2</sup> Recent United States Supreme Court cases dealing with the due process rights of nonresident defendants<sup>3</sup> raise anew the question whether the UCCJA has struck the proper balance between the rights of parents and the welfare of their children. It is not an easy question, especially when considered in light of the confusion created by an earlier Supreme Court case, *May v. Anderson*.<sup>4</sup>

The Supreme Court has held that divorce jurisdiction is divisible.<sup>5</sup> Jurisdiction over the marital status, often designated as jurisdiction

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\*Professor of Law, Indiana University School of Law—Indianapolis. B.S.J., Northwestern University, 1945; J.D., University of Colorado, 1967.

<sup>1</sup>9 U.L.A. 111 (1968). The Indiana version of the Act is IND. CODE §§ 31-1-11.6-1 to -24 (1982). Where appropriate, UCCJA sections will be cited to the Indiana version of the Act which contains no major deviations from the text.

<sup>2</sup>IND. CODE §§ 31-1-11.6-12, -13 commissioners' notes (1982).

<sup>3</sup>*Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>4</sup>345 U.S. 528 (1953).

<sup>5</sup>*Estin v. Estin*, 334 U.S. 541 (1948).

in rem,<sup>6</sup> may be acquired by substituted service, but in personam jurisdiction over the defendant spouse is required before an alimony order will be enforceable in other states.<sup>7</sup> A plurality of the Court applied the in personam requirement to custody in *May v. Anderson*,<sup>8</sup> holding that an ex parte custody decree could not be enforced against the absent parent. Although the opinion in *May* is less than crystal clear, its "only logical construction" is that due process requires in personam jurisdiction over the absent parent.<sup>9</sup> This interpretation is consistent with the plurality's citation to a 1928 Indiana case holding that a custody decree rendered without personal jurisdiction over the absent parent was "void."<sup>10</sup>

When *May* was decided in 1953, it was generally true that in personam jurisdiction could be acquired only by personal service of summons within the state.<sup>11</sup> The Wisconsin state court in *May* had personally served the defendant wife with summons in Ohio, but this service did not give the Wisconsin court in personam jurisdiction over her, because there was no applicable long arm statute. The expansion of long arm jurisdiction after 1953 softened the impact of *May* on custody jurisdiction, and it was during this period that the UCCJA was drafted. In the UCCJA, the drafters virtually ignored the due process implications of *May* and treated custody jurisdiction as purely in rem. They provided notice and an opportunity to be heard for the absent parent,<sup>12</sup> but did not require in personam jurisdiction. The

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<sup>6</sup>E.g., *In re Marriage of Rinderknecht*, 174 Ind. App. 382, 367 N.E.2d 1128 (1977). The United States Supreme Court has eschewed reliance on the designation of divorce jurisdiction as in rem. See *Williams v. North Carolina*, 317 U.S. 287, 297 (1942) ("[I]t does not aid in the solution of the problem presented by this case to label these proceedings as proceedings *in rem*.").

<sup>7</sup>*Estin v. Estin*, 334 U.S. 541 (1948). Many years earlier, the Indiana Supreme Court in *Beard v. Beard*, 21 Ind. 321 (1863), held that an ex parte Indiana judgment for alimony could not be enforced against a nonresident. Although *Beard* was decided before the fourteenth amendment was adopted, the decision's reasoning parallels modern due process analysis, holding that the judgment, based on notice by publication, "was not obtained by due course of law." *Id.* at 328.

<sup>8</sup>345 U.S. 528 (1953).

<sup>9</sup>Clark, *The Supreme Court Faces the Family*, 5 FAM. ADVOCATE 20, 22 (Summer 1982). See also Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379, 384 (1959).

<sup>10</sup>*May v. Anderson*, 345 U.S. 528, 535 n.8 (1953) (citing *Weber v. Redding*, 200 Ind. 448, 455, 163 N.E. 269, 271 (1928)). The *Weber* decision indicates that Indiana was committed to protection of the absent parent's rights long before *May* was decided by the United States Supreme Court.

<sup>11</sup>See, e.g., Act of Sept. 19, 1881, ch. 38, § 56, 1881 Ind. Acts 240 (repealed 1969). Today the Indiana Code permits acquisition of in personam jurisdiction under the long arm statute. IND. R. TR. P. 4.4.

<sup>12</sup>UNIF. CHILD CUSTODY JURISDICTION ACT §§ 5, 12 & commissioners' notes (1968). These provisions are discussed in detail *infra* notes 127-30, and accompanying text.

drafters treated *May* as a full faith and credit case rather than a due process case, stating that *May* permits but does not require interstate recognition of ex parte custody decrees.<sup>13</sup>

The due process implications of *May* assumed new importance, however, when the Supreme Court warned in 1977 that the reach of long arm statutes had due process limits. In *Shaffer v. Heitner*,<sup>14</sup> the United States Supreme Court stated that the due process clause of the fourteenth amendment<sup>15</sup> requires minimum contacts for all assertions of state court jurisdiction over nonresident defendants, whether jurisdiction is labeled in rem or in personam.<sup>16</sup> A footnote in *Shaffer* recognizes an exception for "particularized rules governing adjudications of status."<sup>17</sup> There is little doubt that this status exception will support the continued validity of ex parte divorces,<sup>18</sup> but different considerations apply to child custody.

*Shaffer's* broad holding was confirmed in *Kulko v. Superior Court*,<sup>19</sup> when the Court applied the minimum contacts test to a child support action brought in California against a father who was a resident of New York. Because the father had only the most ephemeral contacts with California, the Court held that California could not assert in personam jurisdiction over him.<sup>20</sup> *Shaffer*, and especially *Kulko*, erected a due process barrier to further expansion of long arm jurisdiction, closing the escape hatch that such jurisdiction had afforded against the due process implications of *May*.<sup>21</sup> The Court's expressed concern for the due process rights of nonresident defendants makes it increas-

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<sup>13</sup>See *id.* § 12 commissioners' notes ("[*May*] relates to interstate recognition rather than in-state validity of custody decrees."). This distinction is discussed in detail, *infra* notes 131-37 and accompanying text.

<sup>14</sup>443 U.S. 186 (1977). Although *Shaffer* involved quasi in rem jurisdiction, its due process holding was far broader in scope, as subsequent decisions confirmed. See, e.g., *Kulko v. Superior Court*, 436 U.S. 84, 91-96 (1978).

<sup>15</sup>U.S. CONST. amend. XIV, § 1.

<sup>16</sup>The jurisdictional test applied in *Shaffer* was the minimum contacts test of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (A party must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'").

<sup>17</sup>433 U.S. at 208 n.30.

<sup>18</sup>The Court has long recognized such decrees as effective to terminate the marital status of the nonresident spouse despite the absence of contacts between the nonresident spouse and the forum. E.g., *Williams v. North Carolina*, 317 U.S. 287 (1942). But see Comment, *The Divisible Divorce Doctrine Reexamined in Light of Shaffer v. Heitner*, 51 Miss. L.J. 801 (1981).

<sup>19</sup>436 U.S. 84 (1978).

<sup>20</sup>*Id.* at 101.

<sup>21</sup>Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C. DAVIS L. REV. 229, 237 (1979) ("If we had hopes that jurisdiction could be extended further and further by long-arm legislation, *Kulko* has dashed these hopes.").

ingly unlikely that the Court will adopt the UCCJA interpretation of *May*.<sup>22</sup> If personal jurisdiction over the absent parent is required in custody cases, as the plurality in *May* indicates, there is little doubt that minimum contacts also will be required. Indeed, *Shaffer* and *Kulko* seem to require minimum contacts even if personal jurisdiction is not required.

This potential conflict between the UCCJA and the due process cases from *May* through *Kulko* reached the Indiana Court of Appeals in *In re Marriage of Hudson*.<sup>23</sup> The UCCJA gave the trial court jurisdiction over the custody issue, but the nonresident father claimed that the court had violated his due process rights when it awarded custody to the mother without having in personam jurisdiction over him and without minimum contacts between him and the Indiana forum. The court of appeals avoided the minimum contacts issue by holding that in personam jurisdiction was not required and that custody jurisdiction under the UCCJA came within the "status exception" of *Shaffer*.<sup>24</sup>

The *Hudson* opinion is grounded firmly on interpretations of the UCCJA by its drafter, Brigitte M. Bodenheimer, as reflected in the official comments to the Act.<sup>25</sup> The result is certainly defensible; it makes the trial court's custody award binding on a father who had removed two of his children to Spain. The holding, however, is not limited to cases involving child snatching;<sup>26</sup> it would deny a minimum contacts defense to *any* absent parent, regardless of his conduct and regardless of the reasons for his absence. The father in *Hudson* had been sent to Spain under military orders, and if no child snatching had been involved, he would have presented a most appealing case for protection of his due process right to a hearing on custody.<sup>27</sup> If that kind of case comes before the United States Supreme Court, it is unlikely that the Court will dismiss so casually the complex due process issues raised.<sup>28</sup>

The *Hudson* court's resolution of the conflict between the UCCJA's child-centered jurisdictional provisions and the due process rationale

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<sup>22</sup>Cf. Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 741-44 (1982).

<sup>23</sup>434 N.E.2d 107 (Ind. Ct. App. 1982), cert. denied, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983) (No. 82-793).

<sup>24</sup>*Id.* at 117. The status exception is contained in a footnote to *Shaffer*. See *supra* note 17 and accompanying text.

<sup>25</sup>434 N.E.2d at 118. See UNIF. CHILD CUSTODY JURISDICTION ACT §§ 12, 13 commissioners' notes (1968). Other courts have reached similar results. *E.g.*, *In re Marriage of Leonard*, 122 Cal. App. 3d 443, 175 Cal. Rptr. 903 (1981).

<sup>26</sup>There are indications in *May* that it was not intended to apply in child-snatching cases. See *infra* note 82 and accompanying text.

<sup>27</sup>The United States Supreme Court has held that there is a due process right to a custody hearing. *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>28</sup>A petition for certiorari in *Hudson* was denied by the United States Supreme Court. 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983) (No. 82-793).

of *May* and *Kulko* is much too easy. *Hudson* makes one wonder whether a better balance might be struck among the interests of the child, the state, and the parents. Only the United States Supreme Court can supply the ultimate authoritative answer, but it is useful to examine the alternatives available to the Court. First, a more detailed examination of the problem is necessary, and a reexamination of the nature of custody jurisdiction provides a useful starting point.

### I. THE BEST INTERESTS OF THE RES

[O]rdinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another. Here, however, such a tension is virtually unavoidable.<sup>29</sup>

In *Hudson*, the Indiana Court of Appeals, following the UCCJA, characterized custody jurisdiction as in rem, and a custody decision as an adjudication of status.<sup>30</sup> In order to bring custody jurisdiction within the status exception of *Shaffer*, the court treated custody as comparable to marital status, which is the basis for in rem jurisdiction in divorce.<sup>31</sup> There is substantial authority for treating custody as a status proceeding,<sup>32</sup> but significant differences between divorce and custody make the fit an uneasy one.

A custody determination does not permanently alter the legal relationship of parent and child as divorce alters the marital relationship.<sup>33</sup> Custody involves a temporary allocation between the parents of rights and duties toward the child, which leaves the essential elements of

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<sup>29</sup>*Smith v. Organization of Foster Families*, 431 U.S. 816, 846 (1977). This statement referred to the conflict between the rights of foster parents and natural parents, but is equally appropriate in reference to the competing rights of children and those claiming their custody.

<sup>30</sup>434 N.E.2d at 118-19.

<sup>31</sup>For a discussion of in rem jurisdiction in divorce, see Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501 (1980).

<sup>32</sup>*E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 69-79 (1969). See Bodenheimer & Neeley-Kvarme, *supra* note 21, at 240; Hazard, *supra* note 9, at 387 & n.30; Comment, *Jurisdiction Over the Nonresident Parent in a Suit Affecting the Parent-Child Relationship*, 34 BAYLOR L. REV. 107, 112 & n.39 (1982).

<sup>33</sup>In support of the UCCJA characterization of custody as a status proceeding, Bodenheimer and Neeley-Kvarme quote Professor Reese, who defines status as a "relationship between two persons, which is not temporary in its nature, is not terminable at the mere will of either and with which the State is concerned." Bodenheimer & Neeley-Kvarme, *supra* note 21, at 240 (quoting Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L.Q. 952, 953 (1977) (emphasis added)). Custody, being always subject to modification by the courts, is temporary in nature and does not permanently alter the relationship of parent and child in the same way marital status is altered by divorce, or the parent-child relationship is altered by termination.

the parent-child relationship unaltered.<sup>34</sup> The custodial parent is given the lion's share of responsibility for making decisions concerning the child's care and education. However, the allocation of rights and duties between the parents is always subject to reconsideration and revision when circumstances change. Meanwhile, the noncustodial parent retains substantial residual rights.<sup>35</sup>

A custody action is primarily a dispute over possessory rights to the child, which makes it more analogous to the alimony-property aspects of divorce than to the adjudication of marital status. Parents fight for possession of the child in much the same way as they would fight over possession of property, casting the child in the role of the *res*. Here the usefulness of the analogy ends, however, for a child is a living, breathing *res* with rights of its own that are at least equal and probably superior to the rights of the parents. In custody cases, "courts are no longer concerned primarily with the proprietary claims of the contestants for the '*res*' before the court, but with the welfare of the '*res*' itself."<sup>36</sup> In determining whether custody jurisdiction will fit into the analytical framework developed in connection with disputes over property, care must be taken to protect the interests of the *res* while doing the least possible damage to the analytical framework, particularly the constitutional framework protecting the due process rights of litigants. It would be surprising if this were an easy task.

A useful illustration of both the similarities and the differences between the law's treatment of children and property may be found in proceedings to terminate parental rights. Such proceedings, unlike custody actions, do permanently alter the parent-child relationship, and therefore fit much more easily into the "status" mold than custody does. Nevertheless, termination proceedings are also analogous in some respects to property actions. For example, the chief ground for ter-

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<sup>34</sup>Rights of inheritance between parent and child, for example, are completely unaffected, and the parent's duty to support the child is affected only to the extent that the court may reduce the noncustodial parent's obligation to a finite sum. Duties of care, education, and nurture toward the child are only temporarily altered. *See* Annot., 9 A.L.R.2d 434, 440 (1950).

Although custody disputes sometimes do involve custodians other than parents, this Article is concerned with parental rights, and therefore is limited to the most common form of custody dispute, that between two parents.

<sup>35</sup>*See infra* note 41 and accompanying text. Parents contending for custody are apt to perceive it as an all-or-nothing proposition, and it may work out that way in practice, especially if the noncustodial parent's opportunities for participation in raising the child are limited, but this possibility is a function of how the parents interact rather than an essential attribute of their legal relations toward the child. *But see* Hazard, *supra* note 9, at 388-89.

<sup>36</sup>*May v. Anderson*, 345 U.S. 528, 541 (1953) (Jackson, J., dissenting). *See also* Bodenheimer & Neeley-Kvarme, *supra* note 21, at 233 ("The child is not technically a party, but the interests of the child are the major issue.").

mination of parental rights is abandonment,<sup>37</sup> and the same ground exists for termination of interests in property. The difference is that the *period* of abandonment is much shorter for children than for property, reflecting the greater need of children for care and cultivation. Herein lies the principal difference between an owner's rights in property and a parent's rights in his children. A parent's relationship to his child encompasses not only rights but duties, including duties of support, education, and nurture. Indeed, a parent's duties and responsibilities toward his child weigh more heavily than his rights in the child, though it is otherwise with property. As a result, a parent retains his right to custody of the child only so long as he fulfills his duties and responsibilities toward the child. Parental rights are important and constitutionally protected,<sup>38</sup> but they are also exceedingly fragile.

While the family remains intact, both parents have equal claim to custody of their children.<sup>39</sup> When the family breaks apart, however, a court must decide how the parents' rights and duties are to be apportioned. Equal partition of a child is seldom possible.<sup>40</sup> The traditional disposition of custody to one parent, with visitation rights to the other, is an unequal division of parental rights and responsibilities. The custodial parent retains the bulk of rights and responsibilities, and the noncustodial parent retains residual rights and duties.<sup>41</sup> Under modern divorce statutes, the duties of support usually are equitably apportioned between the parents.<sup>42</sup> The court determines which parent

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<sup>37</sup>Bodenheimer & Neeley-Kvarme, *supra* note 21, at 241.

<sup>38</sup>The Supreme Court has recognized a substantive due process right of parents in their children. *See, e.g.,* Caban v. Mohammed, 441 U.S. 380 (1979); Bell, *Termination of Parental Rights: Recent Judicial and Legislative Trends*, 30 EMORY L.J. 1065, 1084 (1981) ("The Court has firmly established that a parent has a constitutionally protected liberty interest in retaining custody of his or her child."). *See also* Santosky v. Kramer, 102 S. Ct. 1388 (1982) (due process requires that before a parent's rights may be completely severed, the state must support its allegations by "clear and convincing evidence").

<sup>39</sup>It was not always this way. Early common law gave the father absolute right to custody, while more recently the mother has received a preference. *See infra* note 70.

<sup>40</sup>Joint custody would be analogous to both joint owners *retaining* their interest in the "property," rather than dividing it, or selling it and dividing the proceeds. As a form of *property* disposition, joint ownership is seldom workable because it retains the divorced spouses in what is essentially a partnership situation. The same kind of problem often exists with joint custody. *See, e.g.,* Dodd v. Dodd, 93 Misc. 2d 641, 403 N.Y.S.2d 401 (Sup. Ct. 1978). The traditional custody disposition "seems to be the only workable model for the great majority of ordinary mortals." Bodenheimer, *Equal Rights Visitation and the Right to Move*, 1 FAM. ADVOCATE, Summer 1978, at 19, 19.

<sup>41</sup>Residual rights include the right to visitation and the right to regain full custody should future changes occur. *E.g.,* IND. CODE § 31-1-11.5-24(a) (1982); *In re Guardianship of Phillips*, 383 N.E.2d 1056, 1059 (Ind. Ct. App. 1979).

<sup>42</sup>Today's statutes no longer place the primary duty of support on the father. *E.g.,* IND. CODE § 31-1-11.5-12 (1982). It is doubtful that a statute placing the duty of

receives custody based upon the best interests of the child.<sup>43</sup> Again it is concern for the welfare of the res that distinguishes rights in children from rights in property. The divorcing parents' custody rights essentially amount to a right to a hearing on custody.

In *May v. Anderson*,<sup>44</sup> the Supreme Court seemed to treat the parents' rights as totally analogous to rights in property. The much criticized plurality opinion extended protection to parents' rights without adequately examining the nature of those rights<sup>45</sup> and without considering the children's interests. These deficiencies, combined with the peculiar procedural context in which *May* arose, created a confusion which has persisted to the present day.

## II. DUE PROCESS—FROM DIVISIBLE DIVORCE TO MINIMUM CONTACTS

### A. *May v. Anderson*

If *May v. Anderson*<sup>46</sup> was indeed a due process case, it simply extended the concept of divisible divorce from alimony to custody. However, the extension was not nearly as easy as the plurality opinion suggests. The Supreme Court established the concept of divisible divorce in *Estin v. Estin*,<sup>47</sup> by recognizing separate bases for jurisdiction over marital status and over alimony in interstate divorce cases.<sup>48</sup> The Court held in *Estin* that a Nevada court's jurisdiction over the marital status, based on the husband's domicile in Nevada, entitled the court's ex parte divorce decree to full faith and credit in other states,<sup>49</sup> but that the court needed in personam jurisdiction over the wife before it could affect her right to alimony under a preexisting New York separate maintenance decree.<sup>50</sup>

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support solely on the father would be constitutional under *Orr v. Orr*, 440 U.S. 268 (1979) (invalidating a state statute allowing alimony awards only to divorced wives). Even under earlier law, de facto apportionment of support duties occurred in the many cases in which the support payments were not adequate to meet the child's total needs, as well as the cases in which support could not be collected.

<sup>43</sup>*E.g.*, IND. CODE § 31-1-11.5-21 (1982).

<sup>44</sup>345 U.S. 528, 533-34 (1953).

<sup>45</sup>Later Supreme Court cases have been concerned primarily with parents' rights to a *hearing* on custody, *e.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972), and thus more accurately reflect the transient nature of parental rights.

<sup>46</sup>345 U.S. 528 (1953) (plurality opinion).

<sup>47</sup>334 U.S. 541 (1948).

<sup>48</sup>*Id.* at 549. The wife in *Estin* had been granted separate maintenance by a New York court. Later, the husband moved to Nevada and obtained an ex parte divorce. The Nevada decree did not mention alimony, and the husband claimed that he no longer had to make payments under the New York decree.

<sup>49</sup>*Id.* at 543-44 (citing *Williams v. North Carolina*, 317 U.S. 287 (1942)).

<sup>50</sup>334 U.S. at 548-49. Despite its emphasis on in personam jurisdiction, Justice

When the *May* plurality extended the requirement of in personam jurisdiction to custody, because it concerns "[r]ights far more precious . . . than property rights,"<sup>51</sup> the Court failed to note that the jurisdictional bases for custody never had been the same as for alimony. The plurality merely cited the first Restatement of Conflicts, which listed the child's domicile as the sole basis for custody jurisdiction.<sup>52</sup> If the Restatement had been accurate, then custody jurisdiction based on domicile would have been more akin to divorce jurisdiction than to alimony, but domicile never was the exclusive basis for custody jurisdiction. Historically, equity courts have asserted the power to act for the protection of children within their territorial jurisdiction, regardless of the child's domicile.<sup>53</sup> At the time *May* was decided, state courts also recognized custody jurisdiction based upon personal jurisdiction over both parents. Thus, three distinct bases of custody jurisdiction existed,<sup>54</sup> reflecting the complex and conflicting interests involved.

No single jurisdictional basis can or should qualify as the exclusive basis for custody jurisdiction. The child's domicile is often merely a legal fiction, and there will always be cases in which personal jurisdiction over both parents cannot be obtained. Using the presence of the child as the sole basis for custody jurisdiction would only encourage child snatching by parents.<sup>55</sup> Custody jurisdiction has elements in common with both divorce and alimony jurisdiction. Above all, custody jurisdiction requires flexibility. A forum must always be available to determine or modify custody when the child's needs require it. The

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Douglas' opinion for the Court did not explicitly rest on the due process clause. The immediate question before the Court concerned full faith and credit rather than due process. A later case, *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), was more explicit in its due process rationale. See, e.g., *Hudson v. Hudson*, 52 Cal. 2d 735, 740, 344 P.2d 295, 297 (1959) (Traynor, J.); *Garfield*, *supra* note 31, at 511.

<sup>51</sup>345 U.S. at 533.

<sup>52</sup>*Id.* at 534 n.7 (citing RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 32, 146 illustrations 1, 2 (1934)) (defining the domicile of a child whose parents have separated as that of the parent with whom it lives). Thus, the child's domicile also would be, by definition, the domicile of at least one of the parents, making custody jurisdiction coextensive with divorce jurisdiction.

Justice Jackson's dissent also accepted the *Restatement's* characterization of domicile as the sole basis for custody jurisdiction. 345 U.S. at 538-39.

<sup>53</sup>Such jurisdiction existed in England as early as the seventeenth century and was recognized from the earliest times in the United States. H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 17.1, at 572 (1968). See also *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925) (Cardozo, J.).

<sup>54</sup>*Sampsell v. Superior Court*, 32 Cal. 2d 763, 197 P.2d 739 (1948) (Traynor, J.). These bases of jurisdiction have now been supplanted in most states by the UCCJA. See *infra* notes 114-20 and accompanying text.

<sup>55</sup>It was primarily the problem of child snatching which led to the promulgation and adoption of the UCCJA. See *infra* notes 112-13 and accompanying text.

child's helplessness places a heavy responsibility on the state to provide a forum for settling custody disputes regardless of jurisdictional niceties.<sup>56</sup>

The need for flexibility in custody jurisdiction is reflected in the way the full faith and credit clause<sup>57</sup> has been applied. Ex parte divorces rendered by the state of a spouse's domicile are entitled to full faith and credit,<sup>58</sup> but the lack of finality that characterizes custody decrees<sup>59</sup> has enabled the Court to avoid the full faith and credit question in cases arising both before and after *May*. For example, in a case prior to *May*, *New York ex rel. Halvey v. Halvey*,<sup>60</sup> New York modified an ex parte Florida custody order and granted visitation rights to the father.<sup>61</sup> The United States Supreme Court affirmed, holding that the Florida decree, which was subject to modification in Florida, was entitled to no greater effect in New York than it had in Florida.<sup>62</sup> New York had "at least as much leeway to disregard the judgment, to qualify it, or to depart from it" as Florida did.<sup>63</sup> By using Florida standards to modify the decree, New York gave the Florida decree all the full faith and credit to which it was entitled.<sup>64</sup> It was therefore unnecessary for the Court to decide "whether in absence of personal service the Florida decree of custody had any binding effect on the husband."<sup>65</sup> Because of the procedural context in which

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<sup>56</sup>See *Sampsell v. Superior Court*, 32 Cal. 2d 763, 777, 197 P.2d 739, 749 (1948) ("Unfortunately, cases will arise where one or two elements [of jurisdiction] are lacking, and some court must have jurisdiction in the interest of the child to make proper provision for its custody."). The UCCJA retains multiple bases for jurisdiction, although they are not the ones that prevailed when *May* was decided. See *infra* notes 114-20 and accompanying text.

<sup>57</sup>U.S. CONST. art. IV, § 1.

<sup>58</sup>*Williams v. North Carolina*, 317 U.S. 287 (1942). The Court has been inconsistent at times in allowing full faith and credit for divorce decrees. However, this inconsistency is beyond the scope of this Article. See Garfield, *supra* note 31.

<sup>59</sup>In this respect, custody decrees more closely resemble orders for alimony and child support, which are entitled to full faith and credit only with respect to accrued arrears no longer subject to modification. *Sistare v. Sistare*, 218 U.S. 1 (1910).

<sup>60</sup>330 U.S. 610 (1947).

<sup>61</sup>The New York court also required the mother to post a \$5,000 surety bond to guarantee that the child would be made available for visitation with the father. *Id.* at 612.

<sup>62</sup>330 U.S. at 615-16.

<sup>63</sup>*Id.* at 615.

<sup>64</sup>Full faith and credit, then as now, meant giving a judgment the same effect as it had in the state where it was rendered. The original federal statute implementing the full faith and credit clause, U.S. CONST. art. IV, § 1, required that state court judgments "have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Act of May 26, 1790, ch. 11, 1 Stat. 122 (current version at 28 U.S.C. § 1738 (1976)). Subsequent amendments to this statute have not altered the substance of the congressional definition of full faith and credit.

<sup>65</sup>330 U.S. at 615.

*May* arose, the Court did have to answer that question, and the answer was "no."

The question in *May* was whether the state of Ohio "must give full faith and credit to a Wisconsin decree awarding custody of the children to their father when that decree [was] obtained by the father in an *ex parte* divorce action in a Wisconsin court which had no personal jurisdiction over the mother."<sup>66</sup> The father had brought a habeas corpus action in Ohio to enforce the Wisconsin custody decree after the mother refused to return the children to him following visitation in Ohio. In Ohio, habeas corpus was a legal, rather than an equitable remedy; therefore, a court did not have the power either to determine or to modify custody. The Ohio court could decide only the "immediate right to possession of the children."<sup>67</sup> The father could prevail only by showing that he had a right to custody superior to the mother's, that is, by establishing the interstate validity of the Wisconsin custody order. Thus the issue of interstate recognition of custody decrees came to the court "[s]eparated . . . from that of the future interests of the children."<sup>68</sup> The *May* opinion has been severely criticized for this separation of the jurisdictional and substantive issues,<sup>69</sup> but it was not the plurality that effected the separation. It was the law of Ohio.

Because of the limited nature of the Ohio habeas corpus action, neither the Ohio courts nor the Supreme Court could consider the merits of the custody issue. They could decide only whether the father was entitled to summary enforcement of the *ex parte* Wisconsin order. When the *May* plurality opinion is assessed in light of the procedural context in which the case arose, and when account also is taken of the evanescent nature of parental rights, its impact is considerably softened. Viewed in this light, the *May* decision does not hold that the mother retained full custody rights to her children, or that her rights were somehow superior to the father's, although that may well have been the plurality's unstated assumption.<sup>70</sup> The effect of *May*

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<sup>66</sup>345 U.S. at 528-29.

<sup>67</sup>*Id.* at 532.

<sup>68</sup>*Id.* at 533.

<sup>69</sup>*E.g.*, H. CLARK, *supra* note 53, at 324 n.36; Bodenheimer & Neeley-Kvarme, *supra* note 21, at 249 & n.118; Hazard, *supra* note 9, at 388 n.33.

<sup>70</sup>*Cf.* Foster & Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 HASTINGS L.J. 1011, 1022 (1977) (suggesting that *May* would have been decided differently had the absent parent been the father rather than the mother). At the time *May* was decided, most states recognized the tender years presumption, the strongest version of which would grant custody of young children to the mother unless she were proven unfit. If the plurality assumed this to be the applicable rule, then the mother, in effect, would have a substantive right to custody (the right "far more precious than property rights") which could not be taken away without a hearing proving unfitness. The father, however, would have only the right

is merely to hold that the parents' rights were equal. The father's action failed because he was unable to prove that he had a right to custody superior to the mother's right. Because the marriage had been validly dissolved, *neither* parent had full custody rights. The parents had only the right to have a court apportion their parental rights and duties between them; each parent had a right to a *hearing* on custody.<sup>71</sup> Although a hearing had been held, only the father's point of view had been presented because Wisconsin lacked personal jurisdiction over the mother. Therefore, the Supreme Court held in *May* that enforcement of the *ex parte* custody decree would violate the mother's due process rights.<sup>72</sup> This holding left the divorced parents in status quo, both equally entitled to custody, until a hearing could be held on the merits with both parents before the court.<sup>73</sup>

Unfortunately, none of the several opinions in *May* dealt adequately with the nature of the parents' rights, nor with the immediate consequences of the decision.<sup>74</sup> Justice Frankfurter concurred on the

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to a hearing at which he could attempt to prove the mother's unfitness. The mother would thus have a *prima facie* right to custody superior to the father's right to a hearing.

The tender years presumption has been repealed by statute in Indiana. IND. CODE § 31-1-11.5-21(a) (1982). Even in those states where it persists, it usually is a weak presumption of fact, which would not have the effect of granting either parent a substantive quasi-property right to custody. *But see* *Gordon v. Gordon*, 577 P.2d 1271 (Okla. 1978). Even this watered-down version may be unconstitutional under the Supreme Court's recent sex discrimination decisions. *E.g.*, *Orr v. Orr*, 440 U.S. 268 (1979) (holding that alimony only to wives violates equal protection clause). It is thus abundantly clear that under modern custody law, neither parent has anything more than a right to a *hearing* on custody. The interpretation of *May* in the text is based on this assumption.

<sup>71</sup>*See supra* notes 40-45 and accompanying text. In later parental rights cases, the issue has been defined more clearly in terms of the parent's right to a hearing on custody. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972) (unwed father's right to a hearing on custody). Viewing *May* as a right-to-hearing case makes it more consistent with *Stanley* and requires rejection of Professor Clark's suggestion that *Stanley* may have overruled *May* sub silentio. *See* H. CLARK, DOMESTIC RELATIONS CASES AND PROBLEMS 1037 n.5 (3d ed. 1980). *See also* Coombs, *Interstate Child Custody: Jurisdiction, Recognition and Enforcement*, 66 MINN. L. REV. 711, 742 n.178 (1982); Sherman, *Child Custody Jurisdiction and the Parental Kidnapping Prevention Act—A Due Process Dilemma?*, 17 TULSA L.J. 713, 719-21 (1982).

<sup>72</sup>345 U.S. at 533-34 (plurality opinion).

<sup>73</sup>The Ohio hearing would not be a modification hearing, in which the burden would be on the mother to prove a substantial change in circumstances, but would be an original custody hearing in which the court would determine custody based on the best interests of the children. *See infra* notes 205-06 and accompanying text. Modern long arm statutes would make it more likely that the father could have secured such a hearing in Wisconsin.

<sup>74</sup>Justice Jackson's dissent projected an impasse: "The Wisconsin courts cannot bind the mother, and the Ohio courts cannot bind the father." 345 U.S. at 539 (Jackson, J., dissenting). In fact, the father could have sought a hearing on the merits in Ohio, in a proceeding other than habeas corpus. There would be no problem obtaining personal jurisdiction over the mother and both parties would be bound.

assumption that *May* was a full faith and credit case rather than a due process case. In his view, *May* held only that the full faith and credit clause did not *require* Ohio to recognize the ex parte Wisconsin custody decree, but that Ohio could recognize the Wisconsin decree without violating the mother's due process rights.<sup>75</sup> This "interpretation" of the plurality opinion is impossible to reconcile with the plurality's reference to the necessity for personal jurisdiction over the mother before she could be deprived of "[r]ights far more precious . . . than property rights."<sup>76</sup>

Justice Jackson dissented from the plurality opinion precisely because he thought it *was* a due process opinion and therefore prohibited Ohio from recognizing the Wisconsin custody decree.<sup>77</sup> The only valid reason for denying full faith and credit to the decree would be the violation of the mother's due process rights. The dissent dismissed Justice Frankfurter's concurrence as "reduc[ing] the law of custody to a rule of seize-and-run."<sup>78</sup> Justice Jackson would have treated the

<sup>75</sup>345 U.S. at 535-36. Justice Frankfurter came very close to saying that full faith and credit has no application at all in custody cases. "[T]he child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time." *Id.* at 536. He was even more explicit in denying full faith and credit to custody decrees in *Kovacs v. Brewer*, 356 U.S. 604, 611-16 (1958) (Frankfurter, J., dissenting). It is ironic that the UCCJA, whose goal is to strengthen interstate recognition of custody decrees, should have adopted Justice Frankfurter's interpretation of *May*. See UNIF. CHILD CUSTODY JURISDICTION ACT §§ 12, 13 commissioners' notes (1968).

<sup>76</sup>345 U.S. at 533-34 (plurality opinion). The plurality's reliance on the due process rationale of *Estin* seems clear in this passage:

In *Estin v. Estin* . . . we held Nevada powerless to cut off . . . a spouse's right to financial support under the prior decree of another state. In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.

. . . We find it unnecessary to determine the children's legal domicile [for purposes of establishing custody jurisdiction in Wisconsin] because, even if it be with their father, that does not give Wisconsin . . . the *personal jurisdiction* that it must have in order to deprive their mother of her personal right to their immediate possession.

*Id.* at 533-34 (emphasis added) (citations and footnotes omitted). See also Sherman, *supra* note 71, at 716 ("Justice Frankfurter's explanation is plainly at odds with the opinion in which he joined.").

<sup>77</sup>345 U.S. at 536-37 (Jackson, J., dissenting). Justice Reed joined Justice Jackson's dissent and Justice Minton filed a separate dissent, arguing that the Ohio court properly accorded the decree full faith and credit. *Id.* at 542-43 (Minton, J., dissenting). Justice Clark did not participate, leaving the Court without a clear majority.

<sup>78</sup>*Id.* at 542 (Jackson, J., dissenting). See also Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 811 (1964) ("the Frankfurter position invites removal of the child by a leave-taking parent").

custody decree much the same as a divorce decree, granting it summary enforcement simply because it was rendered by the state of the children's domicile,<sup>79</sup> "until [the Wisconsin court] or some other court with equal or better claims to jurisdiction shall modify it."<sup>80</sup> This position accords full faith and credit to the Wisconsin decree only because the Ohio habeas corpus procedure did not permit its modification. In most other cases, the dissent would allow virtually unlimited modification of custody decrees; it thus affords little more finality or stability to such decrees than the other opinions do, leaving the law substantially as it was in *Halvey*.<sup>81</sup>

In *May*, as in *Halvey*, the Court failed to consider the effect its full faith and credit rulings would have on interstate custody disputes. The plurality noted that the facts in *May* did not involve a parent who had left the jurisdiction to avoid process, or who had "unlawfully or surreptitiously" taken the children from the other parent.<sup>82</sup> These decisions, however, unquestionably encouraged parents to do both.<sup>83</sup> The parent who took the children from the state of marital residence, surreptitiously or not, could avoid the home state's determination of custody and relitigate custody in another jurisdiction, where the absconding parent might well expect to enjoy a home court advantage.

The fact is, however, that the Supreme Court had no good alternatives in *May*. Given the all-or-nothing nature of the Ohio habeas corpus proceeding, the Court had only two choices: it could either require that all states give full faith and credit to all ex parte custody decrees, or that no state need give full faith and credit to such decrees. It probably chose the better alternative. Automatic enforcement of ex parte decrees would have introduced an element of rigidity into an area where flexibility always has been considered necessary to protect the interests of children. The child's interests usually are best served by having both parents present at the custody hearing. A decision mandating full faith and credit for all ex parte decrees would make it less likely that such bilateral hearings would occur.

The Court's dilemma in *May* suggests that the complex problems of interstate custody jurisdiction simply are not susceptible to solu-

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<sup>79</sup>"If ever domicile of the children plus that of one spouse is sufficient to support a custody decree binding all interested parties, it should be in this case." 345 U.S. at 538 (Jackson, J., dissenting).

<sup>80</sup>*Id.* at 542.

<sup>81</sup>See *supra* notes 60-65 and accompanying text.

<sup>82</sup>345 U.S. at 534 n.8. This statement suggests that the *May* holding would not apply at all in a child-snatching case.

<sup>83</sup>"*May* encourages a potential custody defendant to flee or never to enter a jurisdiction in which he fears an adverse custody decision." Comment, *The Jurisdiction of Texas Courts in Interstate Child Custody Disputes: A Functional Approach*, 54 TEX. L. REV. 1008, 1014 (1976).

tion by constitutional fiat. Only legislation could redefine the bases of custody jurisdiction and prescribe their effects, and ultimately the UCCJA<sup>84</sup> and the Parental Kidnapping Prevention Act<sup>85</sup> did perform this function. These statutes developed child-centered bases of jurisdiction which may conflict with the Supreme Court's recent due process/minimum contacts decisions.

### B. *Kulko v. Superior Court*

The *May* plurality's requirement of in personam jurisdiction over the absent parent took on renewed significance when the Supreme Court restricted the expansion of long arm jurisdiction in *Shaffer v. Heitner*<sup>86</sup> and *Kulko v. Superior Court*.<sup>87</sup> In *Kulko*, the Court concluded that the state courts had "failed to heed our admonition that the 'flexible standard of *International Shoe*' does not 'herald[d] the eventual demise of all restrictions on the personal jurisdiction of state courts.'" <sup>88</sup> *Kulko* is particularly significant because it involved in personam jurisdiction in a domestic relations setting, although jurisdiction over child support rather than custody was at issue.

The parents in *Kulko* were domiciled in New York throughout a thirteen-year marriage. When they separated, the wife moved to California and later remarried. The separation agreement, negotiated and signed in New York, gave the father custody of the two children during the school year and gave the mother custody during vacation periods.<sup>89</sup> The father agreed to pay support for the children while they were with the mother. A Haitian divorce decree, obtained by the mother, incorporated the terms of the agreement. Fifteen months later,<sup>90</sup> the daughter, with her father's consent, began living with the mother in California during the school year and with the father during vacations. The son joined his sister two years later, without the father's prior consent.

The mother sued the father in a California state court, seeking a modification of the Haitian divorce decree to award her full custody of the children and to increase child support.<sup>91</sup> Personal jurisdiction

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<sup>84</sup>UNIF. CHILD CUSTODY JURISDICTION ACT §§ 1-28 (1968).

<sup>85</sup>28 U.S.C. § 1738A (Supp. V 1981).

<sup>86</sup>433 U.S. 186 (1977). See *supra* notes 14-18 and accompanying text.

<sup>87</sup>436 U.S. 84 (1978).

<sup>88</sup>*Id.* at 101 (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). For the standard referred to in the quotation, see *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>89</sup>The children were to spend "Christmas, Easter, and summer vacations with their mother." 436 U.S. at 87.

<sup>90</sup>The parties signed the agreement in September 1972 and complied with it as written until December 1973. *Id.*

<sup>91</sup>To effect modification of the foreign decree, the mother "sought to establish the Haitian decree as a California judgment." *Id.* at 88. This procedure, allowing modifica-

over the father was based on California's long arm statute which permitted jurisdiction to be exercised over nonresidents "on any basis not inconsistent with the Constitution of this state or of the United States,"<sup>92</sup> making the California courts' jurisdiction coextensive with due process. The California courts rejected the father's due process attack, reasoning that the father had "caused an effect" in California when he consented to his daughter's living there.<sup>93</sup> The United States Supreme Court disagreed and, carrying out the promise of *Shaffer v. Heitner*,<sup>94</sup> held that *all* assertions of state court jurisdiction over nonresidents would henceforth be subject to the minimum contacts test of *International Shoe Co. v. Washington*.<sup>95</sup>

In the Court's view, the fatal flaw in the California courts' reasoning was their failure to require some purposeful act by the defendant.<sup>96</sup> "A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws."<sup>97</sup> The *causing an effect* rationale could properly be applied to wrongful activity causing injury within the state, or to commercial activity affecting state residents, but not to actions arising from defendant's "personal, domestic relations."<sup>98</sup> This statement has led many commentators to conclude that the Court is requiring a higher standard of minimum contacts for domestic relations

tion of foreign decrees based on comity, was established in *Worthley v. Worthley*, 44 Cal. 2d 465, 283 P.2d 19 (1955) (Traynor, J.). It has been widely followed in other states. *E.g.*, *Kniffen v. Courtney*, 148 Ind. App. 358, 266 N.E.2d 72 (1971).

<sup>92</sup>436 U.S. at 89 n.3 (quoting CAL. CIV. PROC. CODE § 410.10 (West 1973)).

<sup>93</sup>436 U.S. at 88-89. The California Supreme Court held that the exercise of personal jurisdiction over the father was "reasonable" here because he had "purposely availed himself of the benefits and protections of the laws of California" by sending his daughter to live there. *Id.* at 89 (quoting *Kulko v. Superior Court*, 19 Cal. 3d 514, 521-22, 564 P.2d 353, 356, 358 (1977)).

<sup>94</sup>433 U.S. at 212.

<sup>95</sup>326 U.S. 310 (1945). *Shaffer* involved quasi in rem rather than in personam jurisdiction.

<sup>96</sup>436 U.S. 84, 94 (1977) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) ("[I]t is essential in each case that there be *some act* by which the defendant *purposefully* avails [him]self of the privilege of conducting activities within the forum State.") (emphasis added).

<sup>97</sup>436 U.S. at 94 (citing *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)). The Court also rejected California's argument that the father derived financial benefit from his daughter's longer presence in California, noting that the wife could have sought increased support at any time after the daughter first moved to California. "Any ultimate financial advantage to appellant thus results not from the child's presence in California, but from appellee's failure earlier to seek an increase in payments under the separation agreement." 436 U.S. at 95.

<sup>98</sup>*Id.* at 96-97.

cases than for ordinary commercial transactions.<sup>99</sup> This conclusion, if correct, would have disastrous consequences in conjunction with a requirement of personal jurisdiction in custody disputes.<sup>100</sup> Unless it can be shown that a different standard, rather than a higher one, is all that is required in domestic cases, any reaffirmation of the due process implications of *May* may well prove fatal to the UCCJA.

Fortunately, the *Kulko* opinion raised some points which are helpful in distinguishing custody from support cases. The Supreme Court referred to the "unquestionably important" interest of the state "in protecting the welfare of its minor residents and in promoting to the fullest extent possible a healthy and supportive family environment in which the children of the State are to be raised."<sup>101</sup> In rejecting this state interest as sufficient justification for imposing in personam jurisdiction on the nonresident father, the Court noted that California had not indicated any "particularized interest" in trying child support cases, by "enacting a special jurisdictional statute."<sup>102</sup> In the area of custody, the UCCJA would seem to qualify as a "special jurisdictional statute." The Court in *Kulko* also pointed out that the Revised Uniform Reciprocal Enforcement of Support Act (RURESA), which provides procedures for interstate enforcement of support,<sup>103</sup> already served California's interest in aiding collection of child support. Thus, the mother would not be left without a remedy if California could not obtain personal jurisdiction over the father.<sup>104</sup> This reasoning would not necessarily be applicable in custody jurisdiction cases, where no alternative remedies comparable to RURESA exist.<sup>105</sup>

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<sup>99</sup>See, e.g., H. CLARK, *supra* note 71, at 861 n.4; Bodenheimer & Neeley-Kvarme, *supra* note 21, at 231, 237-38.

<sup>100</sup>See *infra* notes 181-97 and accompanying text.

<sup>101</sup>436 U.S. at 98.

<sup>102</sup>*Id.*

<sup>103</sup>RURESA, 9A U.L.A. 643 (1982).

<sup>104</sup>436 U.S. at 98-100 & n.15. One may be tempted to quarrel with the Court's assumptions concerning the efficacy of the RURESA remedy. See, e.g., Fox *The Uniform Reciprocal Enforcement of Support Act*, 4 FAM. L. REP. (BNA) 4017, 4021 (1978) ("erratic prosecution of RURESA petitions"). But any criticism of RURESA falling short of demonstrating its total ineffectiveness would not seem sufficient to refute the Court's position. But see Coombs, *supra* note 22, at 759-62.

<sup>105</sup>There are provisions in the UCCJA designed to minimize the disadvantages to the absent parent of out-of-state litigation, including provisions for travel expenses, out-of-state hearings, and depositions. See IND. CODE §§ 31-1-11.6-8, -11, -15, -18 to -20 (1982). See also Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1234-35 (1969). These provisions are not as extensive, however, as the two-state proceedings set up under RURESA. See IND. CODE §§ 31-2-1-1 to -39 (1982). In any case, these provisions appear in the UCCJA itself, rather than in an alternative remedy, so the *Kulko* reasoning would not apply to a custody action brought under the UCCJA.

Because almost all states have adopted the UCCJA,<sup>106</sup> and its standards have been substantially incorporated into the federal Parental Kidnapping Prevention Act,<sup>107</sup> the UCCJA now represents a nearly universal standard for determining custody jurisdiction. If personal jurisdiction is required in custody cases, inevitably instances will arise in which the state qualifying for custody jurisdiction under the UCCJA cannot acquire personal jurisdiction over the nonresident parent. In such cases, the custody action will have to be brought in the state where the parent can be served, but that state may not qualify for custody jurisdiction under the UCCJA standards.<sup>108</sup> To allow that state to assume jurisdiction would nullify the intent of the UCCJA provisions requiring custody hearings to be conducted in the state with the closest connection to the *child*.<sup>109</sup> Requiring personal jurisdiction in all cases would sacrifice the interests of the child to the convenience of the parents, a result no one would favor. The *Hudson* court sought to avoid this dilemma by ignoring *May* and sidestepping *Kulko*. Before evaluating this resolution of the problem, a closer examination of the UCCJA jurisdictional standards is appropriate.

### III. CUSTODY JURISDICTION UNDER THE UCCJA

*May* can be justly criticized for deciding an issue vital to the welfare of children without adequate discussion of either the underlying policy considerations or the consequences. It may be that these questions were not adequately brought to the Court's attention.<sup>110</sup> It would be impossible today, however, for the Court to ignore the policy considerations which led to the adoption of the UCCJA.

The purposes of the UCCJA are spelled out in some detail in the Act itself, as well as in the prefatory notes.<sup>111</sup> The drafter of the Act, the late Brigitte M. Bodenheimer, summarized the conditions that prompted adoption of the UCCJA:

It will be recalled that for a long time child snatching prior to or after a custody decree was quasi-accepted behavior,

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<sup>106</sup>As of late 1982, 48 states had adopted the UCCJA. 8 FAM. L. REP. (BNA) 2623 (1982).

<sup>107</sup>28 U.S.C. § 1738A (Supp. V 1981). The differences between the federal standards and those of the UCCJA are beyond the scope of this Article. See R. CROUCH, INTERSTATE CUSTODY LITIGATION: A GUIDE TO USE AND COURT INTERPRETATION OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT 91 (1981); Coombs, *supra* note 22, at 850-54; Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297, 299-312 (1981).

<sup>108</sup>See *infra* notes 114-20 and accompanying text. Jurisdiction usually attaches in the state where the child has lived for the past six months or where the child has a significant connection. Neither condition might be met in the state where personal jurisdiction is obtainable over the parent.

<sup>109</sup>See *infra* notes 111-21 and accompanying text.

<sup>110</sup>Hazard, *supra* note 9, at 382.

<sup>111</sup>See UNIF. CHILD CUSTODY JURISDICTION ACT (1968).

somewhere in a no man's land of the law. Legal rules played into the hands of persons engaged in such practices. Child custody could be awarded or modified in any state where the child was physically present, whether or not another state's custody decree had been violated or proceedings were pending or ready to be commenced in the child's home state. Existing custody determinations could be reopened elsewhere and relitigated on the merits, and the child's "best interests" were often assessed differently by a judge in the new state. This state of the law not only encouraged kidnapping and the retention of children after out-of-state visits; it also led to jurisdictional competition between several states, keeping the lives of many children in constant turmoil.<sup>112</sup>

The UCCJA was adopted to "remedy this intolerable state of affairs" and to "bring about a fair measure of interstate stability in custody awards."<sup>113</sup>

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<sup>112</sup>Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203, 203-04 (1981). This article was the last of many that Bodenheimer wrote on the UCCJA.

The Act's own detailed statement of purpose, IND. CODE § 31-1-11.6-1(a) (1982), is as follows:

Sec. 1. Purposes and Construction of Law. (a) The general purposes of this law are to:

- (1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;
- (2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;
- (3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that the courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
- (4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
- (5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;
- (6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;
- (7) facilitate the enforcement of custody decrees of other states; and
- (8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.

<sup>113</sup>UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note (1968). For an excellent discussion of psychological and other types of injury suffered by abducted children,

To accomplish its purposes, the UCCJA rejects all three of the prior bases of jurisdiction over custody: (1) the child's domicile, (2) the physical presence of the child, and (3) personal jurisdiction over both contestants.<sup>114</sup> It adopts, as the primary basis for jurisdiction, the child's "home state," defined as the state where the child has actually lived with a parent or custodian for at least six months.<sup>115</sup> "Home state" is more than a euphemism for "domicile"; it identifies the state where the child actually lives, rather than the state assigned as the child's home because it is the residence of the parents.<sup>116</sup> To discourage child snatching, home state jurisdiction continues for six months after the child's removal from the state, as long as a parent or custodian remains in the home state.<sup>117</sup> The alternate basis for jurisdiction is the "significant connection" of the child, and at least one contestant, with a state having available "substantial evidence concerning the child's present or future care, protection, training, and personal relationships."<sup>118</sup> In addition, the Act includes a provision for emergency jurisdiction when the child has been abandoned, abused, or neglected.<sup>119</sup> A state also can take jurisdiction when no other state is able or willing to exercise jurisdiction.<sup>120</sup>

Although the UCCJA attempts to limit jurisdiction to one state, which usually will be the "home state," the UCCJA also recognizes that a forum for adjudication of custody must always be available. Because of this need, the Act retains some flexibility in the jurisdictional standards, though considerably less than under prior law. It is possible that more than one state can qualify for jurisdiction under UCCJA section 3.<sup>121</sup> In such situations, the Act accords priority of jurisdiction to the state where proceedings were first initiated,<sup>122</sup> but the UCCJA also contemplates that the court with time priority may

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see Note, *The Parental Kidnapping Prevention Act—Analysis and Impact on Uniform Child Custody Jurisdiction*, 27 N.Y.L. SCH. L. REV. 553, 555-57 (1981).

<sup>114</sup>See *Sampsel v. Superior Court*, 32 Cal. 2d 763, 197 P.2d 739 (1948).

<sup>115</sup>IND. CODE §§ 31-1-11.6-2(5), -3(a)(1) (1982). Again, it should be noted that where appropriate UCCJA sections will be cited to the Indiana version of the Act, which contains no major deviations from the text.

<sup>116</sup>A child's domicile is a legal fiction which may or may not be the state where the child actually lives.

<sup>117</sup>IND. CODE § 31-1-11.6-3(a)(1) (1982). There is also a "clean hands" provision under which a court can decline jurisdiction if the child has been "wrongfully taken" from another state. *Id.* § 31-1-11.6-8.

<sup>118</sup>*Id.* § 31-1-11.6-3(a)(2).

<sup>119</sup>*Id.* § 31-1-11.6-3(a)(3).

<sup>120</sup>*Id.* § 31-1-11.6-3(a)(4).

<sup>121</sup>UNIF. CHILD CUSTODY JURISDICTION ACT § 3. Typically, when the child has recently acquired a new home state, the state of its former residence still will have "significant connection" with the child and a custodian, and "substantial evidence" concerning the child will be present in that state.

<sup>122</sup>IND. CODE § 31-1-11.6-6 (1982).

decline jurisdiction in favor of a more convenient forum.<sup>123</sup> To achieve this result, the Act encourages, and sometimes requires, courts to “communicate” with each other in order to determine which court is the more appropriate forum.<sup>124</sup> Once a court that meets the jurisdictional requirements of the Act has reached a decision, all other states are required to recognize and enforce the decree.<sup>125</sup> No other state can modify the decree while the original court retains jurisdiction.<sup>126</sup>

The jurisdictional standards of the UCCJA are focused on the child; the child’s home state or the state having a significant connection with the child usually assumes jurisdiction. The absent parent is entitled to “reasonable notice and opportunity to be heard.”<sup>127</sup> If the parent lives outside the state, notice can be given by personal service, by mail, or “as directed by the court.”<sup>128</sup> The determination

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<sup>123</sup>*Id.* § 31-1-11.6-7.

<sup>124</sup>*Id.* §§ 31-1-11.6-6(c), -7(d). Direct communication between courts is a novel concept which originated with the UCCJA, although patterned to some extent on RURESA. See IND. CODE §§ 31-2-1-1 to -39 (1982).

<sup>125</sup>*Id.* § 31-1-11.6-13.

<sup>126</sup>*Id.* § 31-1-11.6-14(a).

<sup>127</sup>*Id.* § 31-1-11.6-4. Section 4 provides:

Sec. 4. Notice and Opportunity to be Heard. Before making a decree under this chapter, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this state, notice and opportunity to be heard shall be given pursuant to section 5 of this chapter.

<sup>128</sup>*Id.* § 31-1-11.6-5. Section 5 provides:

(a) Notice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice, and may be:

- (1) by personal delivery outside this state in the manner prescribed for service of process within this state;
- (2) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;
- (3) by any form of mail addressed to the person to be served and requesting a receipt; or
- (4) as directed by the court.

(b) Notice under this section shall be served, mailed, or delivered, at least twenty (20) days before any hearing in this state.

(c) Proof of service outside this state may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

(d) Notice is not required if a person submits to the jurisdiction of the court.

An optional provision authorizing service by publication was omitted from the Indiana version of the UCCJA.

of a court meeting the jurisdictional standards of the Act will bind a parent so notified, if he has been given an opportunity to be heard.<sup>129</sup> The Act does not claim, however, that giving the required notice and opportunity to be heard results in personal jurisdiction over the absent parent. In fact, any such intent is expressly disclaimed in the official comments to the Act: "There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions . . . are proceedings in rem or proceedings affecting status."<sup>130</sup>

The conflict between the UCCJA and the *May* plurality opinion is evident. The Act relies on "a common interpretation" of *May*, that "a state is permitted to recognize a custody decree of another state regardless of lack of personal jurisdiction, as long as due process requirements of notice and opportunity to be heard have been met."<sup>131</sup> This interpretation, based upon the Frankfurter concurrence in *May*<sup>132</sup> and adopted by the *Restatement (Second) of Conflicts*,<sup>133</sup> treats personal jurisdiction as irrelevant and *May* as a full faith and credit case rather than a due process case.<sup>134</sup> It is not surprising that the UCCJA adopted this view, considering the uncertainty of the law at the time the Act was drafted. Because the Supreme Court had withheld the protection of full faith and credit from custody decrees,<sup>135</sup> the UCCJA sought stability instead through interstate comity and cooperation.<sup>136</sup> States

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<sup>129</sup>*Id.* § 31-1-11.6-12. Section 12 provides:

A custody decree rendered by a court of this state which had jurisdiction under section 3 of this chapter binds all parties who have been served in this state or notified in accordance with section 5 of this chapter or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this chapter.

<sup>130</sup>UNIF. CHILD CUSTODY JURISDICTION ACT § 12 commissioners' note. *See also id.* § 13 commissioners' note.

<sup>131</sup>*Id.* § 13 commissioners' note.

<sup>132</sup>345 U.S. at 535.

<sup>133</sup>RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 & comment.

<sup>134</sup>"The section [12] is not at variance with *May v. Anderson* . . . which relates to interstate recognition rather than instate validity of custody decrees." UNIF. CHILD CUSTODY JURISDICTION ACT § 12 commissioners' note.

<sup>135</sup>*E.g.*, *May v. Anderson*, 345 U.S. 528 (1953) (plurality opinion).

<sup>136</sup>The prefatory note to the UCCJA points out that "the United States Supreme Court has never settled the question whether the full faith and credit clause of the Constitution applies to custody decrees . . ." UNIF. CHILD CUSTODY JURISDICTION ACT, prefatory note, 9 U.L.A. at 112. This uncertainty led to "a tendency to over-emphasize the need for fluidity and modifiability of custody decrees at the expense of the equal (if not greater) need, from the standpoint of the child, for stability of custody decisions once made." *Id.* at 113.

adopting the Act commit themselves to recognize and to enforce custody decrees from all other states, provided only that the court issuing the decree meets the jurisdictional standards of the Act.<sup>137</sup> Interstate enforcement of decrees is secured through comity, rather than full faith and credit. Viewed as a full faith and credit case, *May* was not an obstacle to achievement of the UCCJA's goals.

Congress recently brought the full faith and credit clause back into the picture, however, by passing the Parental Kidnapping Prevention Act of 1980.<sup>138</sup> The federal act declares that custody decrees meeting standards that parallel the UCCJA jurisdictional standards are entitled to full faith and credit in all states.<sup>139</sup> If a case arose today with facts identical to *May*, the federal statute would require Ohio to give full faith and credit to the Wisconsin decree. It now seems somewhat ironic that the UCCJA was based on the Frankfurter concurrence in *May*, which took the position that full faith and credit had little or no application to custody cases.<sup>140</sup>

It is significant that the UCCJA's choice of Frankfurter's interpretation of *May* occurred several years before the Supreme Court decided *Shaffer and Kulko*, and during a period of unparalleled expansion of interstate jurisdiction.<sup>141</sup> At the time the UCCJA was

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<sup>137</sup>IND. CODE § 31-1-11.6-14 (1982). Section 14 applies whenever a state custody court meets the jurisdictional standards of the Act, even though the state has not adopted the UCCJA. State *ex rel. Marcrum v. Marion County Superior Court*, 403 N.E.2d 806 (Ind. 1980).

<sup>138</sup>28 U.S.C. § 1738A (Supp. V 1981).

<sup>139</sup>*Id.* The full faith and credit clause, U.S. CONST. art. IV, § 1, gives Congress the power to prescribe the "effect" of state judicial proceedings: "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.* (emphasis added). See generally Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (pt. 1), 14 CREIGHTON L. REV. 499, 505 n.26, 604-05 (1981); Comment, *The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act: Dual Response to Interstate Child Custody Problems*, 39 WASH. & LEE L. REV. 149, 159-60 (1982).

Professor Coombs asserts that what the federal statute requires is enforcement rather than full faith and credit despite the statute's title: "Full faith and credit given to child custody determinations." See Coombs, *supra* note 22, at 714, 834-42, 849. Even if it is true that the faith and credit given is less than "full" it is still far greater than has ever been given to custody decrees.

<sup>140</sup>345 U.S. at 535-36. See *Kovacs v. Brewer*, 356 U.S. 604, 613 (1958) (Frankfurter, J., dissenting); Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. the Territorial Imperative (b) The Uniform Child Custody Jurisdiction Act*, 75 NW. U.L. REV. 363, 383 (1980).

<sup>141</sup>Note, *Long-Arm Jurisdiction and Products Liability: Beyond World-Wide Volkswagen*, 11 MEM. ST. U.L. REV. 351, 353 & n.16 (1981) ("The expansion of state judicial jurisdiction continued virtually unchecked between 1945 and 1977.").

drafted, the "minimum contacts" test was used largely in cases involving in personam jurisdiction over corporate defendants.<sup>142</sup> Therefore, it is not surprising that the drafters of the UCCJA felt they could safely sidestep the due process implications of the *May* plurality opinion by applying the in rem label to custody jurisdiction. Now the Court is moving in the direction of greater procedural protection both for nonresident defendants<sup>143</sup> and for parental rights,<sup>144</sup> and the UCCJA appears to be swimming against the tide when it rejects a due process rationale for *May*. For the Court now to hold that due process affords no protection to the rights of absent parents would be incongruous. Even if the Court accepted the UCCJA's designation of custody jurisdiction as in rem, that, in itself, would not suffice to immunize custody jurisdiction from the minimum contacts test under *Shaffer*.<sup>145</sup>

On the other hand, it is equally unlikely that the Court can or will ignore the well-documented history of child snatching and of competition between state courts which led to adoption of the UCCJA and the Parental Kidnapping Prevention Act. The need for jurisdictional and full faith and credit standards in custody cases is too clear to permit the Court easily to overturn those statutes. Also, the UCCJA does provide notice and an opportunity to be heard for the absent parent. UCCJA section 12 states that a custody decree "binds all parties who have been served in this state or *notified* in accordance with section 5 of this chapter or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard."<sup>146</sup> As the comments to section 12 state, "[t]he two prerequisites are (1) jurisdiction under section 3 of this Act and (2) strict compliance with due process mandates of notice and opportunity to be heard."<sup>147</sup> The remaining question then is whether there can be "strict compliance" with the absent parent's due process right to a hearing

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<sup>142</sup>*E.g.*, *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 272-73.

<sup>143</sup>Minimum contacts now are required in all kinds of suits, in rem as well as in personam, and against all defendants, individual as well as corporate. See *Kulko v. Superior Court*, 436 U.S. 84, 91-96 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>144</sup>For example, the Court has held that an unwed father has a due process right to a hearing before he can be deprived of the custody of his children. *Stanley v. Illinois*, 405 U.S. 645 (1972). In addition, no parent, wed or unwed, can have his parental rights terminated without proof by at least a clear and convincing evidence standard. *Santosky v. Kramer*, 102 S. Ct. 1388 (1982).

<sup>145</sup>*Shaffer v. Heitner*, 433 U.S. 186 (1977) (requiring that assertions of in rem jurisdiction be evaluated according to the minimum contacts standards set forth in decisions regarding in personam actions).

<sup>146</sup>IND. CODE § 31-1-11.6-12 (1982) (emphasis added).

<sup>147</sup>UCCJA § 12 commissioners' note (emphasis added).

without an examination of minimum contacts between that parent and the forum. The answer given by the Supreme Court will not necessarily be the one given by the UCCJA and followed by the Indiana Court of Appeals in *In re Marriage of Hudson*.<sup>148</sup>

#### IV. *In re Marriage of Hudson*

The parties in *Hudson* were married in Bloomington, Indiana in 1975 and lived there for a year and a half until the husband was transferred to Iceland. The couple's two children were born in Iceland. In addition, the husband adopted the wife's daughter from a previous marriage. The husband was transferred to the state of Washington in 1978, and the parties lived there until the wife returned to her parents' home in Indiana in July 1979. She went back to Washington a month later, but returned to Indiana with the children in December 1979. The wife filed for divorce in Indiana on March 12, 1980, notifying the husband by mail. On the same day, the husband "apparently forcibly removed" the two younger children from the mother's custody and took them with him to Spain, where he was then stationed with the Navy.<sup>149</sup>

The Indiana trial court entered a decree dissolving the marriage, dividing the marital property, and awarding custody of the three children to the wife. The court of appeals upheld the dissolution and the custody award but reversed the division of property.<sup>150</sup> The appellate court held that the trial court had jurisdiction over the divorce because of the plaintiff wife's domicile in Indiana.<sup>151</sup> The trial court also had jurisdiction to award custody based on the significant connection and substantial evidence standard of UCCJA section 3(a)(2).<sup>152</sup> However, the appellate court held that the court did not have jurisdiction over the marital property because the court lacked in personam jurisdiction over the absent husband.<sup>153</sup>

The court of appeals held that Indiana Trial Rule 4.4(A)(7)

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<sup>148</sup>434 N.E.2d 107 (Ind. Ct. App. 1982).

<sup>149</sup>434 N.E.2d 107, 110 (Ind. Ct. App. 1982).

<sup>150</sup>*Id.* at 110.

<sup>151</sup>In determining that the wife had been domiciled in Indiana for the six months required by IND. CODE § 31-1-11.5-6 (1982), the trial court found that the wife's four-month stay in Washington *after* her original return to Indiana had been only temporary; the wife, therefore, had established residence in Indiana in July 1979, eight months before filing her petition. The court of appeals held that this finding was supported by sufficient evidence. 434 N.E.2d at 112.

<sup>152</sup>434 N.E.2d at 115-17. Although Indiana's version of the UCCJA is titled the Uniform Child Custody Jurisdiction Law (UCCJL), this discussion refers to the UCCJA because the court of appeals relied on the Uniform Act and the commissioners' notes in reaching its decision. Furthermore, section 3 of the UCCJL is identical to the UCCJA. *Id.* at 114-15 nn.6-7.

<sup>153</sup>434 N.E.2d at 112-14.

authorizes jurisdiction over a nonresident spouse who has lived "in the marital relationship within the state" only if the other spouse has maintained continuous residence within the state.<sup>154</sup> Under this interpretation, service upon the husband by mail in Spain did not give the Indiana court personal jurisdiction over him.<sup>155</sup> Thus, the court of appeals settled the question of in personam jurisdiction over the husband adversely to the wife before reaching the custody jurisdiction issue.

The husband argued that due process required in personam jurisdiction over him before the court could determine custody and that no such jurisdiction existed because he had no minimum contacts with Indiana. The appellate court held that in personam jurisdiction is not required under the UCCJA, which treats custody jurisdiction as in rem; the court avoided the minimum contacts issue entirely by relying on the status exception in *Shaffer v. Heitner*.<sup>156</sup>

Initially, the court determined that Indiana had in rem jurisdiction over custody under UCCJA section 3(a)(2), because the state had

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<sup>154</sup>IND. R. TR. P. 4.4(A)(7) provides for jurisdiction over nonresidents based on "living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state." (emphasis added). The appellate court's requirement of continuous residence by the remaining spouse seems fair enough on the facts of *Hudson*, where the couple had lived in Indiana for only one and a half years and had left the state nearly four years before the wife filed her dissolution action. This requirement may make considerably less sense in cases where the period of Indiana residence is much longer and the period of absence is much shorter but still sufficient to break the continuity of the remaining spouse's residence. The holding of *Hudson* makes no allowance for such factual variations.

Note also that Trial Rule 4.4(A)(7) applies to personal jurisdiction for purposes of child custody, as well as for alimony, child support, and property settlement.

<sup>155</sup>Because no claim to personal jurisdiction over the husband could be established based on Trial Rule 4.4(A)(7), there was no occasion for further discussion of possible minimum contacts between the husband and Indiana. Only if a basis for long arm jurisdiction existed under the rule would it become necessary to subject the claimed jurisdiction to the further due process test of minimum contacts. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.14, at 632-33 (2d ed. 1977); Comment, *Constitutional Limitations on State Longarm Jurisdiction*, 49 U. CHI. L. REV. 156, 157 n.14 (1982).

The court's language implies that qualifying for jurisdiction under Trial Rule 4.4(A)(7) would automatically satisfy the minimum contacts test. "Generally . . . this minimum contact requirement may be met under Ind. Rules of Procedure, Trial Rule 4.4(A)(7)." 434 N.E.2d at 112. One can imagine a case, however, in which the spouse's absence from the state had been so prolonged that a genuine question concerning minimum contacts might arise. In such a case, due process might require rejection of in personam jurisdiction even though the technical requirements of Trial Rule 4.4(A)(7) had been met.

The court of appeals also held that the husband had not waived the issue of personal jurisdiction by addressing the merits, and that he was not estopped by his statement that he would "abide by" the trial court's custody decision. 434 N.E.2d at 113.

<sup>156</sup>434 N.E.2d at 117 (citing *Shaffer v. Heitner*, 433 U.S. 186 (1977)).

a "significant connection" with the children and with one contestant, the mother, and "substantial evidence" was available concerning the children's *future* care.<sup>157</sup> Because of the children's recent move to Indiana, no state could qualify as the children's home state under section 3(a)(1).<sup>158</sup> Section 3(a)(2) bases jurisdiction on contacts of the child and *one* parent with the state; the other parent's contacts with the state are irrelevant under the UCCJA. Under *Shaffer*, however, *any* assertion of state court jurisdiction is subject to the minimum contacts test of *International Shoe*.<sup>159</sup> Treating custody jurisdiction as in rem solved only the problems posed by the *May* plurality's requirement of in personam jurisdiction: the issue of minimum contacts

<sup>157</sup>434 N.E.2d at 116 (citing IND. CODE § 31-1-11.6-3(a)(2) (1982)). Under this code section a state has custody jurisdiction if:

(2) it is in the best interest of the child that a court of this state assume jurisdiction because (A) the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and (B) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

IND. CODE. § 31-1-11.6-3(a)(2) (1982).

<sup>158</sup>A state has jurisdiction under section 3(a)(1) if:

(1) this state (A) is the home state of the child at the time of commencement of the proceedings, or (B) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state.

IND. CODE § 31-1-11.6-3(a)(1) (1982).

"Home state" is defined by section 2(5):

(5) "home state" means the state in which the child, immediately preceding the time involved, lived with his parents, a parent, or a person acting as parent, for at least six (6) consecutive months, and in the case of a child less than six (6) months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six (6) month or other period.

*Id.* § 31-1-11.6-2(5).

Although a home state retains its status as such for six months after the child's removal, it does so only if a parent or custodian continues to live in the state. Because neither parent remained in Washington when the wife filed her petition three months after bringing the children to Indiana, Washington could not claim home state status, although it might have qualified under the significant connection/substantial evidence test of section 3(a)(2). No one had filed suit in Washington, so it was unnecessary to decide which state would have the better jurisdictional claim. Had such a dispute over jurisdiction arisen, it would have been determined by communication between the Washington and Indiana courts under Indiana Code sections 31-1-11.6-6, -7. However, in *Hudson* it was necessary only to decide, as the court did, that Indiana *did* have jurisdiction.

<sup>159</sup>433 U.S. 186, 212 (1977) (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

remained. The court of appeals had to rely on the "status exception" of *Shaffer* in order to dispose of the need for minimum contacts altogether.<sup>160</sup>

The status exception is found in a footnote to *Shaffer*: "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness."<sup>161</sup> The footnote follows a statement in the text that many types of in rem jurisdiction "would not be affected" by *Shaffer's* requirement that all assertions of state court jurisdiction "must satisfy" the minimum contacts test.<sup>162</sup> It is not clear whether the Court meant that the basis for the claim of in rem jurisdiction in such cases usually would satisfy the minimum contacts test, or that minimum contacts would not be required at all. The Indiana court assumed that the second interpretation was correct, but the context of the textual statement strongly suggests that the first meaning was intended.<sup>163</sup> The only example of a status adjudication given in *Shaffer* is divorce. A quotation from *Pennoyer v. Neff*<sup>164</sup> refers to divorce jurisdiction as the prime example of adjudications affecting status,<sup>165</sup> and the only authority cited in the footnote, an article by Justice Traynor, discusses the significant differences between divorce jurisdiction and custody jurisdiction.<sup>166</sup> *Shaffer* thus provides scant authority for lumping divorce and custody together under the status label.

A comparison between the rights of the absent parties in divorce and custody cases is critical to the due process issue of minimum contacts. Justice Traynor points out that in divorce cases the absent spouse frequently can claim "no more than a marriage in name."<sup>167</sup> In such cases,

a court could reason that even a defendant who had no contacts whatever with the forum state would not be gravely af-

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<sup>160</sup>434 N.E.2d at 117.

<sup>161</sup>433 U.S. at 208 n.30.

<sup>162</sup>*Id.* at 208.

<sup>163</sup>*See Shaffer*, 433 U.S. at 207-08, in which the Court points out that the "presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation." *Id.* at 207.. *See Coombs*, *supra* note 22, at 741-44.

<sup>164</sup>95 U.S. 714 (1878).

<sup>165</sup>433 U.S. at 201. "Mr. Justice Field's opinion [in *Pennoyer*] carefully noted that cases involving the personal status of the plaintiff, *such as divorce actions*, could be adjudicated in the plaintiff's home State even though the defendant could not be served within that State." *Id.* (emphasis added). The reference to "home state" here is, of course, to plaintiff's domicile, not to the UCCJA concept.

<sup>166</sup>Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 660-61 (1959). The significance of the Court's citation of the Traynor article is discussed in Coombs, *supra* note 22, at 743 n.182.

<sup>167</sup>Traynor, *supra* note 166, at 661.

fectured by a decree enabling the plaintiff to remarry, since there would be no way of compelling the plaintiff to cohabit with defendant and no effective way of preventing the plaintiff from cohabiting with anyone else. . . . In any event, a defendant's purposeless interest in barricading the plaintiff's avenue to freedom is overwhelmingly outweighed by the plaintiff's purposeful interest in securing freedom. Finally, the dubious interest of defendant's state in perpetuating a broken marriage in limbo is overwhelmingly outweighed by the forum state's major interest in the orderly resolution of a plaintiff domiciliary's marital status.<sup>168</sup>

It cannot be said that an absent *parent's* interests in a custody adjudication are "purposeless" or "dubious," or that the parent "would not be gravely affected" by a custody determination made in his absence, especially if no weight is given to the *reasons* for the absence. Justice Traynor recognized that the interests of the state and of the parties are far greater in actions involving children. Contacts between the parties and the state "take on larger and perhaps paramount importance, since *the consequences of any action either declaring or terminating the relationship are so momentous to the parties*. In conjunction with fair play, *these considerations would normally preclude jurisdiction over a nonresident defendant having no contact with the forum state*."<sup>169</sup>

Nothing in the Traynor article supports including custody jurisdiction within the status exception. Indeed, Justice Traynor's statements are entirely compatible with the *May* plurality's reference to "rights far more precious than property rights." Hence it is doubtful that the Court intended either to overrule *May* in a footnote or to dispense with any requirement of minimum contacts in custody cases. Even a plurality opinion is rarely overruled by a footnote, especially when the authority cited in the footnote tends to support the plurality.

The court of appeals in *Hudson* held that compliance with the notice provisions of the UCCJA was sufficient to satisfy "traditional notions of fair play and substantial justice";<sup>170</sup> however, the minimum contacts test is concerned less with notice than with the opportunity to be heard. Notice alone does not satisfy due process if it does no more than inform a defendant of a hearing taking place in a distant

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<sup>168</sup>*Id.* See also Garfield, *supra* note 31, at 510 & n.57 (1980) ("It seems unlikely . . . that the right to remain married to an unwilling spouse rises to the dignity of a due process right."). The same could not be said of a parent's rights in his children.

<sup>169</sup>Traynor, *supra* note 166, at 661 (emphasis added). Justice Traynor concedes that if a parent's whereabouts are unknown, or the parent "has failed to discharge his parental obligations," the state, on giving "the best notice reasonably possible, should be free to promote the interest of the child by permitting his adoption." *Id.* at 662. However, no such concession is made concerning *custody*. See *infra* note 187.

<sup>170</sup>434 N.E.2d at 119.

forum in which he has no realistic chance of appearing. Consequently, the core requirement of the due process clause is usually stated as *notice and an opportunity to be heard*.<sup>171</sup> The forum non convenience provisions of the UCCJA provide some protection for the defendant's right to a hearing,<sup>172</sup> but they are of little use in cases such as *Hudson* where no more convenient forum is available. UCCJA section 7 contemplates that a court will decline jurisdiction only when a court in another state can provide "a more appropriate forum."<sup>173</sup> In *Hudson*, the only alternative forums were Spain, where the husband and two of the children were living, and Washington, where none of the parties lived. Therefore, Indiana was the least inconvenient forum.

If the result in *Hudson* satisfies "traditional notions of fair play and substantial justice," it is only because of the presence of child snatching by the father. The status exception rationale of *Hudson* would mandate the same result even without the child snatching, even perhaps if the *mother* had been guilty of child snatching.<sup>174</sup> Binding a father by a custody determination in favor of a child-snatching mother, made at a hearing he was physically unable to attend in a state with which he had no contacts, would not comport with due process. Such a father should have at least the opportunity of raising a minimum contacts defense to the court's assertion of custody jurisdiction. Due process requires that the *Hudson* rationale be reconsidered.

Upholding the rationale of *Hudson* would require the Supreme Court not only to overrule the plurality opinion in *May*, but also to immunize custody jurisdiction from any minimum contacts inquiry, through the status exception or otherwise. Both actions would be necessary, and it is not clear that the Supreme Court is prepared to do either. Other alternatives need to be examined.

## V. DUE PROCESS WITHOUT MINIMUM CONTACTS?

The UCCJA initially assumed that the absent parent could have due process protection without requiring in personam jurisdiction. The

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<sup>171</sup>*E.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court was concerned *only* with the opportunity to be heard because the plaintiffs were complaining that filing fees and service costs beyond their financial means denied them the opportunity to be heard.

<sup>172</sup>See IND. CODE § 31-1-11.6-7 (1982). Other UCCJA provisions minimize the disadvantages of out-of-state litigation. See *supra* note 105.

<sup>173</sup>IND. CODE § 31-1-11.6-7(a), (c), (d), (e), (h) (1982).

<sup>174</sup>The clean hands provision, *id.* § 31-1-11.6-8, would allow the Indiana court to decline jurisdiction if the mother were guilty of child snatching, but section 8 is discretionary. If the court did take jurisdiction in spite of the mother's conduct, the resulting decree would be binding on the father. On facts similar to *Hudson's*, the father might find some relief in the Soldiers and Sailors' Civil Relief Act, but this would not apply to all absent parents. See 50 U.S.C. app. § 520 (1976).

Act adopted child-centered bases of jurisdiction and labeled jurisdiction as in rem; but it also provided that the absent parent would be bound only if he had notice and the opportunity to be heard.<sup>175</sup> Once the Supreme Court adopted minimum contacts as the due process test for all types of state court jurisdiction, in rem as well as in personam,<sup>176</sup> minimum contacts became the appropriate test for jurisdiction under the UCCJA. How else would one determine whether a state has met the Act's own due process requirement of notice and opportunity to be heard for the absent parent? The question raised by *Hudson* is whether the absent parent can be afforded due process without minimum contacts among the parent, the forum, and the litigation.<sup>177</sup>

It should be clear that *May v. Anderson* is almost irrelevant to this question. It makes little difference whether minimum contacts are required to establish in personam jurisdiction over the absent parent under *May* and *Kulko*, or whether minimum contacts are required to establish in rem jurisdiction over the subject matter of custody under the UCCJA and *Shaffer*. In either event, minimum contacts are required before a binding custody determination can be made.

Designating custody jurisdiction as in rem avoids a minimum contacts inquiry only if one takes the additional step of fitting custody jurisdiction within the *Shaffer* status exception, and then only if the status exception is read as a total exemption from any minimum contacts inquiry.<sup>178</sup> These steps seem to run counter to the Supreme Court's recent concern for the procedural rights of parents,<sup>179</sup> as well as to the Court's generalized concern for the procedural rights of absent defendants.<sup>180</sup> Thus, a real possibility exists that the Supreme Court will reject the *Hudson* reasoning, even though the Court undoubtedly will want to sustain a statute as widely adopted and as well supported by sound policy as the UCCJA. The Court needs a rationale for upholding the UCCJA that is more consistent with its recent due process and parental rights holdings.

If the Court does reject the *Hudson* rationale, any other line of reasoning is likely to result in application of a minimum contacts test to custody cases. The Indiana court assumes in *Hudson* that any such application would be fatal to the UCCJA standards for custody

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<sup>175</sup>See *supra* notes 127-30 and accompanying text.

<sup>176</sup>*Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>177</sup>See *id.* at 207 (1977).

<sup>178</sup>See *supra* notes 160-66 and accompanying text.

<sup>179</sup>*E.g.*, *Santosky v. Kramer*, 102 S. Ct. 1388 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>180</sup>*E.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

jurisdiction,<sup>181</sup> but the Supreme Court has already made it clear that "minimum contacts" does not mean the same thing in all contexts. In *Kulko*, the Court seemed to be applying a more stringent standard to child support cases than it applies in commercial cases.<sup>182</sup> This has led to a fear that a higher standard will apply in all domestic relations cases,<sup>183</sup> including custody; however, this result does not necessarily follow. The one example the Supreme Court gives of jurisdiction falling within the status exception of *Shaffer* is also in the area of domestic relations—divorce.<sup>184</sup> Thus, domestic relations jurisdiction covers the entire spectrum of standards for minimum contacts, from the most restrictive in child support cases to the least restrictive in divorce. All that remains is to determine where custody jurisdiction best fits within that spectrum.

The Court should decline to fix the minimum contacts standard for custody jurisdiction at either end of the spectrum.<sup>185</sup> The analogy to divorce jurisdiction, necessary to the "status exception" rationale, is seriously flawed. As noted earlier, there are important differences between divorce and custody litigation.<sup>186</sup> The absent parent has a far greater interest in custody than an absent spouse has in maintaining a dead marriage.<sup>187</sup> Therefore, the absent parent needs more protection than the spouse in a divorce action.

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<sup>181</sup>434 N.E.2d at 118. In this assumption, the court follows the lead of the drafter of the UCCJA. See Bodenheimer & Neeley-Kvarme, *supra* note 21, at 237-39, 252. An earlier Bodenheimer article, however, suggested that the child's contacts with the state might be used to satisfy the minimum contacts test. See Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1233-34 (1969).

<sup>182</sup>*Kulko v. Superior Court*, 436 U.S. 84 (1978).

<sup>183</sup>*E.g.*, Bodenheimer & Neeley-Kvarme, *supra* note 21, at 237.

<sup>184</sup>See *supra* notes 164-66 and accompanying text.

<sup>185</sup>See *Pasqualone v. Pasqualone*, 63 Ohio St. 2d 96, 103, 406 N.E.2d 1121, 1127 (1980) ("Although the contacts required to allow a court to make a binding custody order may not need to be as great as those required to order a payment, more contact is required than would be required in a divorce action.").

<sup>186</sup>See *supra* notes 32-36 and accompanying text.

<sup>187</sup>See *supra* notes 167-69 and accompanying text. The analogy to divorce works better in cases involving termination of parental rights for abandonment, nonsupport, etc. Here the parent has failed in his responsibility toward the child, forfeiting his claim of rights in the child. See Traynor, *supra* note 166, at 661. Here, too, the child's needs are greater. A final determination will open the door to the creation of new parent-child relationships through adoption, so that the child's needs may outweigh the absent parent's rights even though the result (final termination of rights) is more drastic for the parent. "When a parent abuses or neglects a child . . . the interest of the state shifts from protection of the parent's rights to protection of the child." Bell, *supra* note 38, at 1066.

In custody disputes, however, the absent parent has not failed in his responsibilities toward the child; in fact, he is presumably seeking to assume full responsibility for the child. At any rate, failure cannot be presumed from the parent's mere absence

At the other end of the spectrum, the distinction between child custody and child support is equally clear. A child support action is essentially a dispute over money, but in a noncommercial context. As a result, the Court has found it necessary to apply a more restrictive minimum contacts standard than that used in commercial cases.<sup>188</sup> Although the child is the ultimate beneficiary of the support award, the determination of the amount of support due is not nearly so crucial to the child's welfare as the determination of custody. In addition, the nature of support litigation is such that it can be conducted more easily from a distance than custody litigation.<sup>189</sup> The child's interest in the availability of a forum for custody litigation and the state's obligation to provide such a forum are far greater in custody than in support actions. These considerations add weight to the state's claim of jurisdiction; they usually should suffice to uphold jurisdiction despite any lack of direct contacts between the defendant and the state.

With these considerations in mind, it should be no more difficult to uphold custody jurisdiction than it is to uphold jurisdiction over claims to property in a state. The state's obligation to provide a custody forum is surely greater than its obligation to provide a forum for resolving questions of title to property within the state. The Court indicated in *Shaffer* that it foresaw no problems with upholding jurisdiction over property claims, not as an "exception" to minimum contacts, but by using the presence of the property in the state as a relevant and sufficient contact.<sup>190</sup> It is surprising how easily the Court's language in *Shaffer* can be applied to custody, simply by substituting the word "child" for "property":

[T]he presence of [a child] in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, *when claims to the [child] itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the [child] is located not to have jurisdiction.* In such cases, the defendant's claim to [a child] located in the state would normally indicate that he expected to

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from the state, without considering the reasons for the absence, which would undoubtedly be addressed when the court considers the merits of the case.

<sup>188</sup>See *Kulko v. Superior Court*, 436 U.S. at 93-95 (the father's passive consent to his daughter's living in California was insufficient for jurisdiction based on "causing an effect").

<sup>189</sup>Aside from the availability of interstate litigation through RURESA, cited in *Kulko*, support litigation is concerned primarily with financial information which can easily be reduced to writing and submitted to the court in the form of affidavits or depositions. In custody litigation, the presence of the contending parties, as well as other witnesses familiar with the parents' relationships with the child, is essential.

<sup>190</sup>*Shaffer v. Heitner*, 433 U.S. 186, 207 (1977).

benefit from the State's protection of his interest. The State's strong interest in [protecting children] within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that [child] would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State.<sup>191</sup>

This paraphrased statement appears to conflict with *Kulko*, in which the Court held that the mere presence of his child in California, even with the father's consent, was not a sufficient contact with the state to support in personam jurisdiction over the father in a child support action,<sup>192</sup> but the conflict is illusory. The distinction between child support and child custody is recognized by the italicized words, "when claims to the [child] itself are the source of the underlying controversy."<sup>193</sup> The action in *Kulko* was for money. The claim was not to the child so the Court appropriately could apply, with even greater rigor, the requirement usually applied in commercial cases, "that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>194</sup> However, this requirement of purposeful activity would be impossible to meet in most custody cases, and it would make little sense to apply it in the custody context. The child's best interests are the focus of custody litigation. Parenthood imposes duties and responsibilities toward the child, regardless of where the child may be found. These duties are surely more weighty than the responsibilities of an owner to his property. If ownership of property within the forum is a sufficient contact for jurisdiction over a controversy between claimants to the property, then having a child present within the forum should also be sufficient in most cases for jurisdiction over custody.

There will be some cases, however, in which the forum state will qualify for jurisdiction under the UCCJA, even though the child is not present in the state.<sup>195</sup> In a case such as *Hudson*, when jurisdic-

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<sup>191</sup>433 U.S. at 207-08 (paraphrase) (emphasis added). In the paraphrase in the text, the state's "strong interest in protecting children within its borders" is substituted for the "strong interest in assuring the marketability of property within its borders." Surely that is a better than even exchange.

Use of the child's presence in the state as a minimum contact is suggested in Note, *Jurisdiction—Uniform Child Custody Jurisdiction Act*, 51 TEMP. L.Q. 139, 148 n.66 (1978). See also Bodenheimer, *supra* note 181, at 1233-34.

<sup>192</sup>*Kulko v. Superior Court*, 436 U.S. 84, 94-95 (1978).

<sup>193</sup>*Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (paraphrase).

<sup>194</sup>*Kulko*, 436 U.S. at 94 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

<sup>195</sup>For example, IND. CODE § 31-1-11.6-3(a)(1) (1982) continues home state jurisdiction for six months after removal of the children from the state. Section 3(a)(2) does not require the children's presence at all, a point which is underscored by section 3(b).

Section 3(a)(3) requires the child's presence, in addition to other factors, such as the existence of an emergency. *Id.* § 31-1-11.6-3(a)(3).

tion is claimed under UCCJA section 3(a)(2), the minimum contacts relied upon would have to be the child's "significant connection" to the state and the presence in the state of "substantial evidence" concerning the child.<sup>196</sup> In effect, the child's contacts with the state would have to be attributed to the parent. In most cases, this approach would not stretch the concept of minimum contacts too far, considering the great need of the child for a forum with authority to decide custody, the duty of the state to provide such a forum, and the protection afforded the absent parent by the notice requirement and the forum non convenience provisions of the UCCJA.<sup>197</sup> The policy reasons for stretching minimum contacts are even more compelling when the party claiming the due process-minimum contacts defense has engaged in child snatching. In such a situation, the minimum contacts defense should be denied altogether.

To the extent that the minimum contacts test is concerned with considerations of federalism,<sup>198</sup> rather than solely with defendants' rights, the near-universal adoption of the UCCJA by the states provides a sufficient answer to any suggestion that the UCCJA forum state is usurping the power of other states. In effect, the other states have consented to any "usurpation" by adopting the UCCJA.<sup>199</sup> Because nearly all of the states, as well as the Congress,<sup>200</sup> now agree that the UCCJA jurisdictional standards provide the best solution to the complex problems raised by custody litigation in a federal system, there is no room for the argument that an assumption of jurisdiction under these standards violates principles of federalism, even by the few states that have not yet adopted the Act. Even the nonadopting states receive benefits from the Act in terms of interstate recognition of their decrees, provided only that those states meet the jurisdictional standards of the Act. Thus, the arguments based on federalism should weigh in favor of UCCJA jurisdiction.

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<sup>196</sup>*Id.* § 31-1-11.6-3(a)(2).

<sup>197</sup>*Id.* § 31-1-11.6-7. "Sensible application" of the minimum contacts test should sustain jurisdiction "in all but extreme cases." Coombs, *supra* note 22, at 763-64. See also Pasqualone v. Pasqualone, 63 Ohio St. 2d 96, 102-03, 406 N.E.2d 1121, 1126 (1980); Comment, *The Due Process Dilemma of the UCCJA*, 6 OHIO N.U.L. REV. 586, 594 (1979).

<sup>198</sup>The Court stresses federalism considerations in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980). But see Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 817 (1955) (arguing that due process should be concerned only with the rights of defendants); Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses* (pt. 2), 14 CREIGHTON L. REV. 735, 843, 846 (1981).

<sup>199</sup>*Cf. Elkind v. Byck*, 68 Cal. 2d 453, 439 P.2d 316, 67 Cal. Rptr. 404 (1968) (holding in effect that Georgia, by adopting the Uniform Reciprocal Enforcement of Support Act, consented to the application of the law of the father's residence, California, in determining his child support obligation).

<sup>200</sup>See *supra* notes 106, 138-39 and accompanying text.

This is not to say that minimum contacts would exist in every custody case in which UCCJA standards are met. The minimum contacts test would be meaningless if the concept were stretched to the point where *any* contact would suffice. Therefore, it is necessary to consider what would happen if a court were to uphold a minimum contacts defense in a fact situation similar to *Hudson* but without the child-snatching element. Would the court have the power to determine custody in the father's absence? Would its decree be enforceable against the father? A literal reading of *May* would require a negative answer to both questions, but here again it is necessary to consider the special nature of custody proceedings. The forum court is faced with a child in need of a determination of custody, and the court has sufficient contacts with the child under the UCCJA standards to make the determination. The court has a duty to the child to determine custody, and a duty to the absent parent to protect his due process right to a hearing on custody. The court need not choose between two apparently conflicting duties because it can accommodate both.

The court's first and immediate duty is toward the child. Even though the child's interests would be best served by a determination made after a full hearing with both parents present,<sup>201</sup> when that is impossible, the court must do the best it can with the evidence at hand. The court must determine custody, and in this situation, assuming the mother to be fit, it will have little choice but to award custody to the mother. In rem jurisdiction over custody under the UCCJA should be sufficient to give the court power to issue an ex parte decree in these circumstances.

Although a due process reading of *May* seems to dictate that the father not be bound by the ex parte decree, much has changed since *May* was decided. Both the UCCJA<sup>202</sup> and the Parental Kidnapping Prevention Act<sup>203</sup> now require that custody decrees rendered by courts meeting the UCCJA jurisdictional standards be enforced in other states, and that the absent parent be bound, if he had notice and an opportunity to be heard.<sup>204</sup> It might be argued that the UCCJA opportunity to be heard requirement itself imports a minimum contacts test, but this would not contribute to solution of the problem. The purposes of the UCCJA and of the full faith and credit and due process clauses can be served by holding that the decree is prima facie entitled to enforcement in all states, even against the father, but that the father remains entitled to an *original* hearing on custody, rather than

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<sup>201</sup>See Coombs, *supra* note 22, at 750-51.

<sup>202</sup>IND. CODE § 31-1-11.6-13 (1982).

<sup>203</sup>28 U.S.C. § 1738A (Supp. V 1981).

<sup>204</sup>IND. CODE § 31-1-11.6-12 (1982); 28 U.S.C. § 1738A (Supp. V 1981).

a modification hearing.<sup>205</sup> At this original hearing, the court would determine custody de novo based on the best interests of the child, and the father would not have the burden of proving changed circumstances.<sup>206</sup> Nor would courts in other states be required to defer to the custody jurisdiction of the original forum, as UCCJA section 14 ordinarily would require.<sup>207</sup> Any court qualified to decide custody under the UCCJA and able to provide a full-scale hearing with both parties present<sup>208</sup> could hear and decide custody de novo.

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<sup>205</sup>See Sampson, *What's Wrong with the UCCJA?*, 3 FAM. ADVOC., Spring 1981, at 28, 30.

In effect, the suggested treatment makes the ex parte decree effective to maintain the status quo only until the absent parent is able to secure the hearing to which he is constitutionally entitled, rather than declaring the ex parte decree void, as would be the case with other kinds of judgments (e.g., a money judgment obtained in violation of the defendant's due process rights). To protect the child, the parent has the burden of seeking redress for the violation of his rights.

<sup>206</sup>This approach is not to be confused with a similar rule formerly followed in Oregon. In *Williams v. Zacher*, 35 Or. App. 129, 581 P.2d 91 (1978), the Oregon Court of Appeals held that change of circumstances did not have to be shown in an Oregon hearing because the ex parte Colorado decree awarding custody to the mother had been made without notice to the father. The court also relied, however, on the fact that Colorado did not have jurisdiction under the UCCJA at the time its custody order was entered. In *Grubs v. Ross*, 47 Or. App. 631, 614 P.2d 1225 (1980), *rev'd*, 291 Or. 263, 630 P.2d 353 (1981), the same no change of circumstances rule was applied without discussing the prior (Montana) court's jurisdiction, simply on the ground that no prior adversary hearing had been held in the case. 47 Or. App. at 637, 614 P.2d at 1228. This application was much too broad, especially in view of the fact that no adversary hearing had been held because the father had removed the child from Montana before the mother filed her divorce petition. As applied by the Oregon courts, the no change in circumstances rule seriously undermined the central purpose of the UCCJA, to prevent child snatching. See *supra* notes 111-13. Both decisions resulted in awards of custody to child-snatching parents, although the *Williams* court had little choice, because both parents had engaged in child snatching. The Oregon Supreme Court recognized that child snatching "has become a serious societal problem" when it reversed *Grubs*, 291 Or. 263, \_\_\_, 630 P.2d 353, 362 (1981).

The rule advocated in this Article would allow the absent parent a de novo hearing on custody only when he has been deprived of due process, as in the *Williams* case, and not in every instance in which no adversary hearing has been held, as in the court of appeals decision in *Grubs*.

The Oregon rule was derived from *Settle v. Settle*, 276 Or. 759, 556 P.2d 962 (1976), in which the Oregon courts granted custody to a child-snatching mother who had left Indiana with the children after the divorce action had been filed and she had been awarded temporary custody by the Indiana court. Indiana clearly had jurisdiction over the subject matter and in personam jurisdiction over the mother. Therefore, its final decree awarding custody to the father was entitled to more respect under UCCJA section 14 than it received in the Oregon proceeding. *Settle* was overruled by the Oregon Supreme Court. *Grubs v. Ross*, 291 Or. 263, 630 P.2d 353 (1981).

<sup>207</sup>IND. CODE § 31-1-11.6-14 (1982).

<sup>208</sup>This limitation is necessary in order to prevent a return to pre-UCCJA anarchy. Only a bilateral order, issued after a full hearing by a court with access to all

This approach has the advantage of preserving for the absent parent his essential due process right to a *hearing* on custody, while according *prima facie* validity to the existing *ex parte* decree. As applied to the facts of *May*, it would mean that an *ex parte* custody decree would be enforced in a summary proceeding, even against the absent parent,<sup>209</sup> at least until a full hearing could be held. If the absent parent attempted to take the child without legal proceedings, the decree could be used to return the child to the other parent, pending the hearing. Thus, the central purpose of the UCCJA and the federal statute, the prevention of child snatching, could still be effected, while some protection would be afforded to the absent parent's due process rights.

The suggested approach places the respective rights of the parents, the child, and the state in their proper order. It would not devalue the absent parent's rights by treating them as no weightier than the absent spouse's rights in a divorce case. It also would recognize both the great interest of the child in having a forum available to adjudicate custody and the overwhelming responsibility of the state to provide such a forum. In most instances, these interests of the child and the state would outweigh the parent's rights. In those few extreme cases where the absent parent's minimum contacts defense was successful, however, a hearing *de novo* would at least preserve for him that which due process guarantees: a meaningful opportunity for a hearing.

Holding another original custody hearing would not require the court to ignore the parent's absence from the child or any child snatching. These facts would be relevant to the merits of the custody issue. A parent's long absence may indicate a weakening of the bonds between parent and child, regardless of the reasons for the absence.<sup>210</sup> A parent's resort to child snatching may reflect his lack of maturity, judgment, and sensitivity to the child's needs. One would expect that the result rarely would be different in an original custody hearing than it would have been in a modification hearing, but due process does not guarantee results: it guarantees only the opportunity for a hearing.

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relevant evidence, should be sufficient to override the *prima facie* validity of the original custody decree. Otherwise we would again be faced with battling parents, armed with conflicting *ex parte* custody decrees, heralding a resurgence of child snatching.

<sup>209</sup>This result is achieved, not by overruling or even ignoring *May*, but by the operation of the UCCJA and the federal statute. See R. CROUCH, *supra* note 107, at xi; Comment, *The Due Process Dilemma of the Uniform Child Custody Jurisdiction Act*, 6 OHIO N.U.L. REV. 586, 589 (1979) (arguing that the states in effect "overruled" *May* when they adopted the UCCJA).

<sup>210</sup>*Cf. Unwed Father v. Unwed Mother*, 177 Ind. App. 237, 244, 379 N.E.2d 467, 472 (1978).

If this approach is followed, it makes little difference whether *May* is read as requiring in personam jurisdiction over the absent parent, or whether it is interpreted as a due process case or as a full faith and credit case. The Supreme Court will not need to repudiate the due process implications of *May*.<sup>211</sup> If it so desires, the Court may continue to treat *May* as the first of a growing line of cases dealing with parents' due process rights. The Court may even interpret *May* as requiring in personam jurisdiction in custody cases. If it does, the notice and opportunity to be heard provisions of UCCJA sections 5 and 12 can be read as long arm provisions giving the custody court in personam jurisdiction over the absent parent.<sup>212</sup> Because these sections require due process notice and an opportunity to be heard, they readily lend themselves to such an interpretation, despite the statements to the contrary in the comments.<sup>213</sup> It is the Court's longstanding policy to interpret statutes so as to avoid constitutional problems.<sup>214</sup> The due process problems raised by rejecting the UCCJA comments' interpretation of *May* could easily be cured by interpreting the UCCJA text as conferring in personam jurisdiction. If this interpretation were applied to the facts of *Hudson*, for example, service by mail on the father in Spain would be treated as giving the Indiana court in personam jurisdiction over the father.<sup>215</sup> The court then would have to apply a minimum contacts test appropriate to custody cases.

On the other hand, if the Court accepts the UCCJA's characterization of *May* as a full faith and credit case, there would be no need to alter the characterization of custody jurisdiction as in rem. In personam jurisdiction would not be required, but under *Shaffer*, a minimum contacts inquiry would still be necessary. In either event, the court's minimum contacts inquiry should be essentially the same.

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<sup>211</sup>See *supra* notes 8-22 and accompanying text.

<sup>212</sup>See *Wilke v. Wilke*, 73 A.D.2d 915, 423 N.Y.S.2d 249 (1980); Coombs, *supra* note 22, at 739, 862; Garfield, *supra* note 31, at 546. Early drafts of the UCCJA did contain explicit long arm provisions. See Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1232-33 (1969).

This approach probably would not work where the optional notice by publication provision of UCCJA section 5 is relied on, but such notice would not be likely to satisfy due process in any case.

<sup>213</sup>UNIF. CHILD CUSTODY JURISDICTION ACT §§ 12, 13 & commissioners' notes.

<sup>214</sup>*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

<sup>215</sup>In this event, the existence of in personam jurisdiction would be determined differently for custody than for the other incidents of the marriage. The court's jurisdiction for purposes of property division would still be determined under IND. R. TR. P. 4.4(A)(7), but in personam jurisdiction for custody would be decided under IND. CODE. § 31-1-11.6-3 (1982). The minimum contacts tests applied would also be different for custody and for property.

## VI. CONCLUSION

If *May v. Anderson* ever was as great a threat to interstate enforcement of custody decrees as its critics envisioned, it has been effectively neutralized by statute. The UCCJA now requires interstate enforcement of custody decrees by comity, and the federal statute<sup>216</sup> has reinforced this command with a requirement of full faith and credit. These statutes represent a consensus of both the state and federal legislatures that custody decisions made by courts having adequate contacts with the child must be readily enforceable interstate. Faced with such near-unanimity on a question of social and legal policy, the Supreme Court will have ample incentive to uphold the UCCJA's jurisdictional standards, if they can be reconciled with the Court's due process holdings.

The Supreme Court, in recent years, has expressed great concern both for parental rights and for the rights of nonresident defendants. These concerns coalesce when the nonresident defendant is a parent claiming custody of his child. The Court's due process holdings in *Shaffer* and *Kulko* require minimum contacts whenever state jurisdiction is asserted over a nonresident, whether jurisdiction is labeled in rem or in personam. The Indiana Court of Appeals sought to avoid this requirement in *In re Marriage of Hudson*, by holding that custody jurisdiction comes within the status exception in *Shaffer*. It is doubtful, however, that the Supreme Court will accept such a blanket exemption from minimum contacts inquiry for all adjudications of status.

The need for binding determinations of custody can be reconciled with the due process rights of absent parents if both the similarities and the differences between custody and other kinds of cases are taken into account. A determination of custody by a court competent to make the decision under UCCJA standards should be accorded prima facie validity in other states, provided the absent parent has been given adequate notice of the action. Due process requires, however, that the absent parent be allowed to raise the defense of lack of minimum contacts, either in the original proceeding, as in *Hudson*, or in a subsequent enforcement proceeding. If proper consideration is given to the child's need for a determination of custody and the state's duty to provide a forum competent to make the determination, this defense will rarely be successful.

When the minimum contacts defense is successful, it will lead, in effect, to the conclusion that the absent parent was deprived of his due process opportunity for a hearing on custody; however, the result should not be to invalidate the ex parte custody decree. The

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<sup>216</sup>Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (Supp. V 1981).

denial of the parent's opportunity for hearing can be cured by granting him a hearing. This new hearing would not be a modification hearing, at which the absent parent would have the burden of establishing a change of circumstances, but an original hearing in which the determination of custody would be made *de novo*, based upon the best interests of the child. The hearing can be held in any state that meets the UCCJA standards and that can obtain participation by both spouses, without the usual deference to the jurisdiction of the original custody court.

This approach would serve not only the interests of the absent parent, but those of the child as well. A full hearing at which both parents are present is necessary to enable a court to determine the best interests of the child. There is no need to devalue the absent parent's rights or undercut the due process holdings of *Shaffer* and *Kulko*, in order to secure automatic enforcement of all *ex parte* custody decrees. An appropriate minimum contacts test, properly applied, need imperil neither the UCCJA nor the welfare of the child.



# Professional Team Sports New Legal Arena: Television and the Player's Right of Publicity

JAMES W. QUINN\*  
IRWIN H. WARREN\*\*

## I. INTRODUCTION

After a decade of litigation, the furor over players' rights in professional team sports, which stemmed from the labor and antitrust issues implicated by practices such as the college draft, option clauses, and the right of compensation (the Rozelle Rule), has largely subsided through judicial determination and collective bargaining.<sup>1</sup> However, a new cloud of player-owner strife appears to be forming on the horizon. With lucrative television contracts providing an increasingly larger share of the professional team sports revenue package,<sup>2</sup> it is hardly surprising that players, both individually and through their collective bargaining agents, are now seeking to obtain part of these substantial television revenues.<sup>3</sup>

Other factors in the professional sports world today foreshadow even greater efforts by the players in this regard. For example, players' associations in the major team sports are increasing both in

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\*Partner with Weil, Gotshal & Manges. Member of the New York Bar. B.A., Notre Dame University, 1967; J.D., Fordham University, 1971. The author is representing baseball players on this issue.

\*\*Partner with Weil, Gotshal & Manges. Member of the New York Bar. B.A., Columbia College, 1971; J.D., Columbia Law School, 1974. The author is representing baseball players on this issue.

<sup>1</sup>See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1979); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976); *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n.*, *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975), 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

<sup>2</sup>For example, the four-year television package entered into with all three television networks in 1977 by the National Football League (NFL) provided for more than \$650 million in revenues to be paid to NFL member teams. See *N.Y. Times*, Mar. 11, 1979, § 5 (Sports), at 8, col. 1. These revenues exceeded more than one-half of each individual NFL team's annual total revenues. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1174 n.46 (D.C. Cir. 1979). Professional baseball and basketball also have lucrative network and local television contracts that provide their clubs with substantial annual revenues. In December of 1981, for example, the National Basketball Association (NBA) entered into a reported \$88 million contract. See *N.Y. Times*, Dec. 23, 1981 at B6, col. 5. The NFL thereafter entered into new television contracts with each of the three networks that reportedly totaled \$1.8 billion. See *N.Y. Times*, Feb. 27, 1982, at 17, col. 1.

<sup>3</sup>See *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, No. 82 (Civ. 3710 (N.D. Ill. filed June 14, 1982); *Silas v. Manhattan Cable Television Inc.*, No. 79 Civ. 3025 (S.D.N.Y. filed June 8, 1979); *Pay-TV: Baseball's Next War*, *N.Y. Post*, Aug. 14, 1981, at 82, col. 1.

strength and in militancy.<sup>4</sup> In addition, the explosive growth of cable television<sup>5</sup> in recent years and, particularly, the need of cable television for sports programming to permit greater penetration into highly lucrative potential markets have precipitated a new player-owner struggle over cable television as a new source of revenues. For example, for the first time, three professional sports leagues, Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL) have entered into nationwide cable network television contracts. Many individual MLB, NBA, and NHL teams also have separate local cable contracts, often forming a "package" of several sports teams in the same city.<sup>6</sup> Indeed, all-sports networks for cable television, which have twenty-four hours per day sports programming, have been formed, while other cable stations rely heavily on sports programming.<sup>7</sup> Currently, both broad-

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<sup>4</sup>The most graphic example of player solidarity was the major league baseball players' successful strike in 1981 to prevent imposition of a system of compensation for free agents. The baseball players had no recourse except to strike: The baseball team owners did not face the threat of an antitrust litigation to prevent them from imposing the compensation system because baseball continues to have an anomalous antitrust exemption. *Flood v. Kuhn*, 407 U.S. 258 (1972). *But see Mackey v. NFL*, 543 F.2d 606, 616-23 (8th Cir. 1976) (although the Rozelle Rule is not an antitrust violation per se, under some circumstances, it may be a violation); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975) (college player draft and reserve system was per se violation of antitrust laws).

The other major team sports have no such exemption. *See Radovich v. NFL*, 352 U.S. 445 (1957); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

<sup>5</sup>In the four-year period between 1975 and 1978, the cable industry's revenues nearly doubled and the number of cable subscribers increased by approximately 40%. McDowell, *Investors Drawn to Cable TV*, N.Y. Times, Mar. 6, 1979, at D1, col. 4. The most recent survey indicated that 23.7 million households, or 29% of all households with television sets, subscribe to cable systems. Harnetz, *Cable TV Buoyed by Popularity, Looks to Future*, N.Y. Times, May 4, 1982, at C16, col. 1. The expansion of cable television has continued, and the resultant impact on both the current fortunes and future plans of professional sports leagues and teams has been dramatic. *See, e.g., Johnson, You Ain't Seen Nothin' Yet*, SPORTS ILLUS., Aug. 10, 1981, at 48; *Pay Cable May Make the Rich Even Richer*, THE SPORTING NEWS, Mar. 28, 1981, at 10; Eskenazi, *Cable TV Begins to Make Big Changes in Professional Sports*, N.Y. Times, Apr. 19, 1981, § 5 (Sports), at 1, col. 1; Veese, *In Sports, Money Is the Main Issue*, N.Y. Times, Mar. 16, 1981, at C1, col. 1.

<sup>6</sup>*See Taaffe, Tooting His Own Einhorn* SPORTS ILLUS., Sept. 6, 1982, at 48; The Washington Post, Dec. 15, 1982, at D9, col. 5; *see also* articles cited *supra* note 5.

<sup>7</sup>*See Johnson, supra* note 5; Piantadosi, *Cable TV—With Its Sports Glut—Is Sneaking Up on Us*, The Washington Post, Aug. 3, 1982, at D1, col.1. The burgeoning success of cable television in the sports field has raised other disputes outside the player-owner sphere, including the question of the "pirating" of distant signals by cablecasters. *See generally* Note, *Crossed Signals: Copyright Liability for Resale Carriers of Television Broadcasts*, 16 IND. L. REV. 611 (1983). In addition, the increased popularity of

cast and cable television companies deal solely with leagues in regard to national television coverage and with individual teams in regard to local television. The leagues and teams purport to sell all rights regarding the televising of their games.

These developments have focused increasing attention on the nature of a professional team athlete's relationship with his particular team or league: Specifically, the focus is on the extent to which an athlete's "right of publicity" affects the ability of that team or league to enter into contracts with television broadcasters or cable television companies for the televising of that athlete's performance without first obtaining express consent from the athlete. The critical issue is whether a professional athlete, as a performer, relinquishes his exclusive common law, and in some cases statutory, right to his own *persona* with respect to the broadcast of his performance by signing an agreement to play with a professional sports team before a live audience. Before attempting to analyze that ultimate question, however, a detailed discussion of the rights at issue is required.

Although the development of the law regarding an individual's right of publicity has been a relatively recent phenomenon, the concept has become firmly established.<sup>8</sup> Furthermore, in a variety of contexts, professional athletes have been recognized as having rights of publicity that the courts will protect.<sup>9</sup> Not even first amendment considerations will permit broadcasters or other media representatives to violate these rights of publicity.<sup>10</sup>

Despite these considerations, uncertainty remains regarding the athlete's right of publicity in his performance in the context of the televising or cablecasting of a team sports event, an area in which the courts have yet to rule.<sup>11</sup> The ultimate resolution of this issue should reflect the fact that the players in team sports do have a right of publicity in their performances in addition to, and distinct from, any complementary right that the team or league may have in the games which they organize and promote. Contractual negotiations, either on a player-by-player basis or more likely through collective bargaining, will ultimately resolve the respective interests of players and teams.<sup>12</sup>

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cable television has sparked disagreements among sports franchise owners themselves regarding the extent to which individual clubs are willing to share or forego their individual cable package revenues. *Revenues Disputed In N.B.A.*, N.Y. Times, Jan. 6, 1980, § 5 (Sports), at 1, col. 6.

<sup>8</sup>See *infra* text accompanying notes 13-31.

<sup>9</sup>See *infra* text accompanying notes 32-49.

<sup>10</sup>See *infra* text accompanying notes 50-61.

<sup>11</sup>See *infra* text accompanying notes 62-71.

<sup>12</sup>See *infra* text accompanying notes 72-133.

## II. NATURE OF THE RIGHT OF PUBLICITY GENERALLY

The development of the law regarding the right of publicity has been marked by considerable confusion. Perhaps the primary reason for this confusion is the fact that the right of publicity developed from and has been grouped with the right of privacy.<sup>13</sup> The right of publicity protects a person's interest in his own *persona*, regardless of whether it is deemed a property interest,<sup>14</sup> so as to prevent someone else from using or appropriating the person's image or likeness for commercial advantage and, hence, to prevent unauthorized commercial exploitation.<sup>15</sup> In contrast, the right of privacy is designed primarily to protect a person's feelings, sensibilities, and his general right to be left alone.<sup>16</sup>

The right of publicity has been held to provide a basis for relief in contexts in which the right of privacy has been deemed inadequate. In the most common situations, the unauthorized use of a well-known person's picture has been held actionable under the right of publicity.<sup>17</sup> For example, in *Grant v. Esquire, Inc.*,<sup>18</sup> a magazine had superimposed Cary Grant's picture on the torso of a model for certain clothing. Grant had not authorized the use of his picture for that purpose or for any other purpose, although years earlier he had agreed to the use of his picture in a similar context. The court held that the right of publi-

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<sup>13</sup>See W. PROSSER, LAW OF TORTS § 117, at 804 (4th ed. 1971). Prosser identifies four distinct types of tort under the right of privacy: (1) intrusion upon the plaintiff's physical solitude or seclusion, *id.* at 807; (2) public disclosure of private acts, *id.* at 809; (3) false light in public eye, *id.* at 812; and, (4) appropriation of plaintiff's name or likeness for defendant's benefit, *id.* at 804. This fourth category is the right of publicity. See also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571-72 (1977).

<sup>14</sup>Compare *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1280, 1282 (D. Minn. 1970) (right of publicity protects property interests) with *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953) ("Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.").

<sup>15</sup>See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 282-84 (S.D.N.Y. 1977); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279-83 (D. Minn. 1970).

<sup>16</sup>W. PROSSER, *supra* note 13, at 804. See also *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728-29 (S.D.N.Y. 1978); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279-82 (D. Minn. 1970); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 621, 396 N.Y.S.2d 661, 664 (1977). The courts in these cases recognized the distinction between the rights of privacy and publicity, but note the failure of courts in various other cases to make such a distinction. See generally *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981) (refusing to dismiss complaint that incorrectly pled right of privacy rather than right of publicity).

<sup>17</sup>See, e.g., *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977); *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973); *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981).

<sup>18</sup>367 F. Supp. 876 (S.D.N.Y. 1973).

city protects even public figures from having the publicity value of their names and reputations appropriated by another without authorization, even in a case where the plaintiff did not want anyone, including himself, to profit from such publicity value.<sup>19</sup>

The right of publicity also has been used to prevent publication of a cartoon caricature of a public figure.<sup>20</sup> Despite the fact that the plaintiff, boxer Muhammad Ali, was a well-known public personality, the court in *Ali v. Playgirl, Inc.*,<sup>21</sup> held that an injunction had been properly granted: "That [plaintiff] may have voluntarily on occasion surrendered [his] privacy, for a price or gratuitously, does not forever forfeit for anyone's commercial profit so much of [his] privacy as [he] has not relinquished." <sup>22</sup> The use of a person's name and biographical data may be protected under the right of publicity when it is used for commercial purposes, such as a board game, rather than for a nonfictionalized biography.<sup>23</sup> Even a public personality's style may be protected by the right of publicity.<sup>24</sup>

Perhaps most importantly in terms of the ultimate implications for professional sports, the right of publicity has been recognized to

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<sup>19</sup>*Id.* at 880.

<sup>20</sup>*Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

<sup>21</sup>447 F. Supp. 723 (S.D.N.Y. 1978).

<sup>22</sup>*Id.* at 727 (quoting *Booth v. Curtis Publishing Co.*, 15 A.D.2d 343, 351-52, 223 N.Y.S.2d 737, 745, *aff'd*, 11 N.Y.2d 907, 183 N.E.2d 812, 228 N.Y.S.2d 468 (1962)). In contrast, one court held that the use of a picture on a poster sold commercially did not violate a right of privacy statute, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney's 1976), when the individual was engaged in a political campaign. *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (1968).

<sup>23</sup>*Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, 72 Misc. 2d 788, 790, 340 N.Y.S.2d 144, *modified*, 42 A.D.2d 544, 345 N.Y.S.2d 17 (1973).

<sup>24</sup>*Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977). In *Lombardo*, the court recognized Guy Lombardo's "legitimate proprietary interest in his public personality" when the defendants produced an advertisement that used an actor who imitated Lombardo's style, in a New Year's Eve setting, with the music of "Auld Lang Syne." However, recovery under the New York privacy statute, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976), as opposed to the common law publicity theory, was denied. Recovery under the New York privacy statute was similarly denied in *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 205, 341 N.E.2d 817, 379 N.Y.S.2d 390 (1975). The court held that "Artie Shaw does not have any property interest in the Artie Shaw 'sound'. So long as there is an absence of palming off or confusion, competitors might 'meticulously' duplicate or imitate his renditions of musical composition." *Id.* at 205, 341 N.E.2d at 820, 379 N.Y.S.2d at 394 (citation omitted). See also *Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir. 1962) (no cause of action under New York privacy statute for imitation of voice and delivery style of well-known comedian, where name or likeness not used); *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973) (no infringements of plaintiff's right of publicity when her name or likeness not used). But see *Carson v. Here's Johnny Portable Toilets, Inc.*, No. 80-1720 (6th Cir. Feb. 1, 1983) (portable toilet manufacturer's use of the phrase, "Here's Johnny," held to violate talk show host Johnny Carson's right of publicity even though his actual name was not used).

protect a performer's interest in his own performance.<sup>25</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>26</sup> involved a "human cannonball" act. A local television station, despite Zacchini's express protest, filmed Zacchini's act and showed it in its entirety on a nightly news program. Although the Ohio Supreme Court held that Zacchini's performance was protected by the right of publicity, the court also held that the broadcast was protected by the first and fourteenth amendment privileges and, therefore, the court denied recovery.<sup>27</sup> The United States Supreme Court, after discussing the Ohio court's holding that a right of publicity existed under Ohio law,<sup>28</sup> held that the broadcast of Zacchini's entire performance, even on a news program, was not protected by any constitutional privileges.<sup>29</sup> "[U]nlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, [such broadcast] goes to the heart of petitioner's ability to earn a living as an entertainer."<sup>30</sup> The Court noted that "[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."<sup>31</sup>

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<sup>25</sup>*Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977).

<sup>26</sup>47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977).

<sup>27</sup>47 Ohio St. 2d at 232-34, 351 N.E.2d at 460-61.

<sup>28</sup>433 U.S. 562, 567-68 (1977). The existence of a common law right of publicity is an issue of state law, which the federal courts are bound to apply. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Not all states have recognized a right of publicity in the same manner or to the same degree. *See generally* W. PROSSER, *supra* note 13, § 117. It should be noted that more than one state's laws may apply in a particular case given the wide geographic scope that may be encompassed by a broadcast or cablecast. The court in such circumstances may have to analyze the plaintiff's right of recovery under several different states' laws. *See, e.g., Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

<sup>29</sup>433 U.S. at 575-79.

<sup>30</sup>*Id.* at 576.

<sup>31</sup>*Id.* (citation omitted). Recovery under the New York privacy statute, N.Y. CIV. RIGHTS LAW, §§ 50-51 (McKinney 1976), in similar circumstances, had been denied a quarter of a century earlier in *Gautier v. Pro-Football, Inc.*, 278 A.D. 431, 106 N.Y.S.2d 553 (1951), *aff'd*, 304 N.Y. 354, 107 N.E.2d 485 (1952). In *Gautier*, a lion-tamer performed during the half-time of a football game that was being telecast. Despite his protest, his act was also telecast. The plaintiff's action under the New York privacy statute was dismissed. The court held that there was no privacy interest involved because the plaintiff had chosen to perform in a football stadium. *Id.* at 438, 106 N.Y.S.2d at 560. The court also noted that the performer's act was newsworthy and that neither the performer nor the act was connected to any particular commercial in the broadcast. *Id.* at 435-38, 106 N.Y.S.2d at 557-60. *Gautier* can best be understood as limiting the scope of the statutory right of privacy in New York. *Accord* *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401 (E.D. Pa. 1963). *See also infra* text accompanying notes 50-61. The court in *Gautier* specifically observed that the plaintiff might have a right

### III. RIGHT OF PUBLICITY AS APPLIED TO PROFESSIONAL SPORTS AND ATHLETES

The applicable considerations regarding the right of publicity generally have been applied in the context of professional athletes in a variety of situations. A sports figure, like any other celebrity, has a legitimate proprietary interest in his public personality: "A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property."<sup>32</sup> Accordingly, the right of publicity has been held to protect a professional athlete's interests in a variety of circumstances. For example, the unauthorized use of the names and statistical information of individual baseball players, which were incorporated into a board game that was sold commercially, was held to violate the players' rights of publicity.<sup>33</sup>

Similarly, the courts have recognized that a professional athlete has a right of publicity in his photograph, which the athlete may exploit for commercial gain, and this right of publicity may not be infringed or appropriated by anyone else.<sup>34</sup> In *Haelan Laboratories, Inc.*

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of recovery under some theory other than the statutory privacy claim. 278 A.D. at 439, 106 N.Y.S.2d at 561. In *Ettore v. Philco Television Broadcasting Co.*, 229 F.2d 48 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956), this language was interpreted to permit recovery under New York law for an unauthorized telecast of a film of a boxer's performance under an unfair competition theory. Particularly in light of the decisions of the Ohio Supreme Court and the United States Supreme Court in *Zacchini, Gautier* should not preclude recovery under a right of *publicity* theory. This distinction between recovery based on privacy as opposed to recovery based on publicity was expressly relied upon in *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1280 n.4 (D. Minn. 1970). Recently the New York appellate division construed sections 50 and 51 of the New York Civil Rights Law to make no such distinction between the recovery rights of a public person or a private individual. *Brinkley v. Casablancas*, 80 A.D.2d 428, 440, 438 N.Y.S.2d 1004, 1012 (N.Y. App. Div. 1981).

<sup>32</sup>*Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (baseball players' right of publicity in their names and statistics upheld). *See also* *Spahn v. Messner, Inc.*, 18 N.Y.2d 324, 327, 221 N.E.2d 543, 544, 274 N.Y.S.2d 877, 878 (1966) ("The individual player's income will frequently be a direct reflection of his popularity and ability to attract an audience.").

<sup>33</sup>*Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970). The right of publicity similarly was held to prevent use of professional golfers' names and statistics in *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (1967). *Uhlaender* is particularly noteworthy because the co-plaintiff was the Major League Baseball Players Association, to which Uhlaender had assigned certain of his rights. A players association's standing to assert the rights of publicity of its members is an issue of increasing importance and may prove to be the ultimate means of resolving disputes in this area. *See infra* notes 111-33 and accompanying text.

<sup>34</sup>*See, e.g., Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). Even the courts that have denied recovery

*v. Topps Chewing Gum, Inc.*,<sup>35</sup> a baseball player had assigned the right to use his picture to Topps, a company that sold baseball cards. When a competing baseball card company attempted to use the player's picture, Topps successfully sued. The court first had to address the issue whether the player had a right of publicity to assign. The court found that such a right indeed existed under New York law: "[I]n addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture . . . ."<sup>36</sup> The right of publicity theory set out in *Haelan* was extended in *Ali v. Playgirl, Inc.*<sup>37</sup> to permit the plaintiff to enjoin the distribution of a cartoon-type caricature of himself in a magazine. The court in *Ali* stated: "The distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or 'persona.'"<sup>38</sup>

The Court of Appeals for the Third Circuit has come closest to addressing the issue of protecting the interest of a professional athlete from unauthorized broadcasting of his performance in *Ettore v. Philco Television Broadcasting Corp.*<sup>39</sup> The *Ettore* case involved a professional boxer who had signed a contract in 1936 to fight Joe Louis. At that time, Ettore also signed a contract permitting the fight to be filmed and to be shown in movie theatres. Approximately fifteen years later, during the first years of television, excerpts of the fight film were broadcast as part of a television show. Ettore sued for damages.<sup>40</sup>

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generally have recognized the existence of a player's right of publicity, and they have based their rulings in the cases before them on the player's contractual grant of the right to a third party. *E.g.*, *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401 (E.D. Pa. 1963). *Cf.* *Namath v. Sports Illustrated*, 80 Misc. 2d 531, 363 N.Y.S.2d 276 (Sup. Ct.), *aff'd*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976) (as part of its advertising campaign, a sports news magazine can use photographs of famous athletes that had previously appeared in the magazine's articles because the photographs demonstrated the nature and quality of the magazine's contents).

<sup>35</sup>202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

<sup>36</sup>*Id.* at 868. For a discussion of the subsequent developments and implications of the players' rights of publicity in this context, including the antitrust litigation following the assignment of such rights to the Baseball Players Association, see *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1715 (1982).

<sup>37</sup>447 F. Supp. 723 (S.D.N.Y. 1978).

<sup>38</sup>*Id.* at 728.

<sup>39</sup>229 F.2d 481 (3d Cir. 1956).

<sup>40</sup>Although Ettore sued on several theories, it appears that what concerned him the most was the fact that only the portions of the fight in which he was not very successful were broadcast, whereas the third round, in which Ettore had had his finest

The court's analysis in *Ettore* involved two main concerns: the plaintiff's right to recover under state law,<sup>41</sup> and whether the plaintiff had relinquished his right to recover for an unauthorized television broadcast by consenting to the filming and subsequent exhibition of his performance.<sup>42</sup> The court did not speak in terms of the right of publicity, because at that time it was still a rather novel concept; however, the court did examine the plaintiff's claims based on " 'his property rights, right of privacy, good name and reputation,' "<sup>43</sup> as well as those based on unfair competition principles.<sup>44</sup> The *Ettore* court stated: "The fact is that, if a performer performs for hire, a curtailment, without consideration, of his right to control his performance is a wrong to him. Such a wrong vitally affects his livelihood, precisely as a trade libel, for example, affects the earnings of a corporation."<sup>45</sup>

Although the *Ettore* court's ultimate conclusion was clear, the court's reasoning and its terminology were not. Any possible confusion as to the meaning of *Ettore*, however, has been dispelled by the recent Third Circuit decision in *Fleer Corp. v. Topps Chewing Gum, Inc.*<sup>46</sup> in which the court, after discussing *Zacchini* and *Haelan* at length, declared:

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moments, was not included in the televised excerpts. *Ettore* alleged that this resulted in his being held up to ridicule and embarrassment. See 229 F.2d at 483.

<sup>41</sup>*Id.* at 484. In the first instance, the court had to determine which state law applied. It decided that because the show had been televised in Pennsylvania, New York, New Jersey, and Delaware, the laws of each of those states had to be addressed for *Ettore* was potentially injured in each of those states. For an example of the difficulties facing the courts in the context of injunctive relief for violation of rights of publicity, see *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 730-31 (S.D.N.Y. 1978).

<sup>42</sup>229 F.2d at 487-94.

<sup>43</sup>*Id.* at 484 (quoting the plaintiff's complaint).

<sup>44</sup>*Id.* at 490, 493. The *Ettore* court specifically noted the decision in *Gautier v. Pro-Football, Inc.*, 278 A.D. 431, 106 N.Y.S.2d 553 (1951), which had denied recovery to a performer whose act was broadcast without consent, based on the privacy statute in New York, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976). The *Ettore* court observed that the New York Court of Appeals had indicated that *Gautier* might have had some other, unasserted cause of action and suggested that this might be for unfair competition. The court in *Ettore*, therefore, found that *Ettore* did have a right of recovery under New York law, 229 F.2d at 493, a decision fully consistent with the holding of the Second Circuit in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953). See also *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981).

<sup>45</sup>229 F.2d at 490. *Ettore* was cited for this proposition by the United States Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 572-73 n.9 (1977). The Court, in *Zacchini*, observed that "the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors." *Id.* at 573.

<sup>46</sup>658 F.2d 139 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1715 (1982).

[E]ach player's exclusive right of publicity and its effect on the trading card market, is central to our analysis.

The exclusive right of major league baseball players to control the form and frequency of their commercial publicity has been long established. . . .

. . . .

This circuit recognized the right of publicity not long after the landmark *Haelan* case. In *Ettore v. Philco Television Broadcasting Corp.*, . . . we held that a prize fighter who licensed the motion picture rights to his prize fight retained a right of publicity over the television rebroadcast of the same movie.<sup>47</sup>

Based upon the decisions that uphold professional athletes' rights of recovery in cases involving still photographs and biographical data<sup>48</sup> and the steady trend of the courts to recognize, to articulate, and to extend protection to a performer's right of publicity in his actual performance,<sup>49</sup> there is reason to conclude that a court is likely to hold that any athlete has a property right in his athletic performance, including his performance in a team sport or in other multiple participant events. After all, it would be difficult to rationalize a ruling that a player in a team sport has a right of publicity in his name, photograph, and statistics, but not in the very performance that made the right valuable in those ancillary contexts.

#### IV. PROFESSIONAL ATHLETE'S RIGHT OF PUBLICITY AND FIRST AMENDMENT PRIVILEGE CONSIDERATIONS

Broad claims by newspapers, magazines, and broadcasting companies that their conduct in disseminating the pictures or performances of athletes and entertainers is protected under the first amendment have been rejected by the courts. In *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>50</sup> the Supreme Court specifically held that the first and fourteenth amendments did not give a television station the privilege of appropriating the plaintiff's performance without his consent. The Court stated:

Wherever the line in particular situations is to be drawn between media reports that are protected and those that are

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<sup>47</sup>*Id.* at 148-49 (citation omitted).

<sup>48</sup>See *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); see also *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

<sup>49</sup>See, e.g., *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

<sup>50</sup>433 U.S. 562 (1977).

not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner [Zacchini] for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner, or to film and broadcast a prize fight, or a baseball game, where the promoters or the participants had other plans for publicizing the event.<sup>51</sup>

Similarly, in *Grant v. Esquire, Inc.*,<sup>52</sup> a magazine's claims of chilling or impairing first amendment rights were rejected.<sup>53</sup> The court specifically recognized that a newspaper or magazine (and presumably a television station) was entitled to report on almost any activity in which a well-known public figure such as Grant might engage, but the court observed that the freedom did not entitle the media "to appropriate his services as a professional model."<sup>54</sup> The court held:

This decision tells this publisher—or any other that may learn of it—just two things:

- (a) It must refrain from making under-the-table arrangements with actual or potential advertisers which would convert an apparent news story into a paid advertisement; and if it can be established by competent evidence that the publisher has not so refrained, it must respond in damages; and
- (b) If the publisher feels impelled to trade upon the name and reputation of a celebrity, it must pay the going rate for such benefit.<sup>55</sup>

The constitutional issue, of course, is clouded somewhat by the news/entertainment distinction in general, and is clouded, in particular, in the context of professional sports. Athletic feats certainly may be newsworthy, and they are regularly reported in the broadcast and print media. Game highlights and still photographs are regularly included in news reports. The decisions dealing with the right of

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<sup>51</sup>*Id.* at 574-75 (citations omitted). On remand, the Ohio Supreme Court also concluded that the Ohio State Constitution should not be deemed to immunize the station from damage claims for infringement of the right of publicity. The court saw "no compelling reason on the record . . . to render a constitutional declaration beyond that which the majority of the United States Supreme Court announced in reviewing [the] cause." 54 Ohio St. 2d 286, 287, 376 N.E.2d 582, 583 (1978).

<sup>52</sup>367 F. Supp. 876 (S.D.N.Y. 1973).

<sup>53</sup>*Id.* at 881.

<sup>54</sup>*Id.* at 884. See also *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981).

<sup>55</sup>367 F. Supp. at 883. See also *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

publicity do not seem to preclude such reporting nor do they generally consider use of the pictures or the videotapes to constitute a misappropriation of anyone's act.<sup>56</sup>

However, just as television broadcasting companies have separate news and sports divisions, the nature of particular sports conduct and of particular reports about sports also can be distinguished. It is one thing to show a particular golf shot or an isolated play in a baseball game, after the fact, accompanied by a brief narration summarizing an entire performance or contest: for example, the results of a golf tournament involving seventy shots by each of one hundred golfers, or the nightly baseball scores. In *Zacchini*, the Supreme Court recognized that "[i]t is evident, and there is no claim here to the contrary, that a plaintiff's state-law right of publicity would not serve to prevent . . . reporting [of] the newsworthy facts about [his] act."<sup>57</sup> On the other hand, showing an entire game as it is played—even if nothing other than the final score proves to be particularly newsworthy—plainly is conduct of a different character. It is this sort of appropriation that has been held not to be protected under the first and fourteenth amendments.

Nevertheless, cases may arise in which the distinction drawn is much closer. In *Ettore v. Philco Television Broadcasting Corp.*,<sup>58</sup> three of the five rounds of Ettore's fight with Joe Louis were shown: query whether showing one round of a fight would be a sufficiently limited broadcast.<sup>59</sup> In *Zacchini*, the fact that the act was at a local fair and

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<sup>56</sup>The court in *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973), specifically recognized the newsworthy aspects of public figures' conduct. Cf. *Gautier v. Pro-Football, Inc.*, 278 A.D. 431, 106 N.Y.S.2d 553 (1951), *aff'd*, 304 N.Y. 354, 107 N.E.2d 485 (1952) (broad approach to the term "newsworthy" in the context of the New York privacy statute).

<sup>57</sup>433 U.S. at 574.

<sup>58</sup>229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

<sup>59</sup>In *Ettore*, because the fight had taken place some 16 years earlier, it obviously was not a news item, regardless of the length of the film clip; and the film was not shown as part of a news broadcast. Of note in this regard is the decision in *New Boston Television Inc. v. Entertainment Sports Programming Network, Inc.*, 1981 COPYRIGHT L. REP. (CCH) ¶ 25,293, at 16,625 (D. Mass. Aug. 3, 1981). There, the owner-operator of a Boston television station and the Boston professional baseball and hockey teams sued ESPN, a network that provides sports programming to cable stations for retransmission to the public, and to certain cable systems. The plaintiffs obtained an injunction against the defendant ESPN's practice of taping the plaintiff's copyrighted broadcasts of sporting events and then including excerpts of approximately two minutes duration as part of a program entitled "Sportscenter," which was composed of highlights of current sporting events. Although *New Boston* turned on issues of "fair use" under the Copyright Act, *see* 17 U.S.C. § 107 (1976), certain aspects of the court's decision would seem applicable in the right of publicity context, particularly in light of the Supreme Court's recognition in *Zacchini* of the similar policies underlying both copyright and right of publicity doctrines. *See* 433 U.S. at 573, 574-75. *See also supra* note 45

would continue to be performed in the near future may have had news aspects. The *Zacchini* case was particularly difficult because the nature of the performance was such that it could be, and had been, shown in its entirety during the time for an average news clip. On remand to the Ohio Supreme Court, the distinction between showing all or part of a performance was the subject of a concurring opinion by three justices, which may presage difficulties for the media in future cases that involve news-type broadcasts. Specifically, the concurring justices took the position that it was not necessary for an entire act to be appropriated in order for an infringement to occur:

It would seem that in order to reconcile the media's right to inform the public about newsworthy entertainment with the entertainer's right to enjoy the fruits of his own industry, some degree of restriction on freedom of the press is unavoidable. The only real distinction between the two proposed tests is that I would impose liability where the media appropriates [those] portions of an act which an audience would otherwise have paid to see, whereas my concurring brother has formulated a standard under which the media could avoid liability simply by excluding any portion of the appropriated act which it deems to be of lesser public interest.<sup>60</sup>

In a separate concurring opinion, one justice specifically recognized that this is not a major concern in the context of most sports events, which, by their nature, are too long to show on the news except in highlight form.<sup>61</sup>

#### V. APPLICATION OF THE RIGHT OF PUBLICITY TO TEAM SPORTS PERFORMANCES: THE TWILIGHT ZONE

Notwithstanding the many cases that recognize an athlete's right of publicity generally, in cases that involve an athlete's assertion of his rights of publicity in his performance in the context of team sports, the team or league defendants may argue that cases such as *Ettore* are inapposite because they deal with individual performances rather

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and *infra* note 76. Specifically, the *New Boston* court rejected the defense that ESPN was using the excerpts "primarily for 'news' purposes and hence should be protected by the fair use doctrine . . . to assure the public's right of access to newsworthy information." 1981 COPYRIGHT L. REP. (CCH) ¶ 25,293, at 16,626. Rather, the court held that "the public right of access to such information . . . is sufficiently protected merely by enabling defendants to report the underlying facts which the plaintiff's videotapes record. It does not . . . permit defendants to appropriate the plaintiff's *expression* of that information by copying the plaintiff's films themselves." *Id.* at 16,626-27 (emphasis by court).

<sup>60</sup>54 Ohio St. 2d at 290, 376 N.E.2d at 585 (Celebrezze, J., concurring).

<sup>61</sup>*Id.* at 295, 376 N.E.2d at 587 (Brown, J., concurring).

than with team games. For example, in *Silas v. Manhattan Cable Television, Inc.*,<sup>62</sup> three professional basketball players brought suit against several cable television companies for alleged violations of the players' rights of publicity, and rights of privacy under the New York Civil Rights Law. The defendants contended that the

[p]resent plaintiffs, skilled as they claim they are, would have little of value to publicize if it were not for the basketball league and the games organized, scheduled, and produced by the NBA and the teams. It is elementary that an athlete whose skills are in a team sport cannot exploit those skills alone. Without a team, the player's skill as a basketball player is totally unmarketable.<sup>63</sup>

This argument does not appear to withstand analysis. There is no reason why a team sport athlete is not entitled to the full value of his performance, including that value as is reflected in broadcast revenue for the games themselves, when Zacchini and Ettore were entitled. Ettore, for example, depended upon the existence of another player-competitor with whom to fight, and upon a promoter to organize, to schedule, and to produce the fight, which was ultimately broadcast, as much as any team sport athlete depends upon his team and league. Undoubtedly, the television station would not have been interested in broadcasting clips from home movies of Ettore shadow-boxing. This is equally true with other nonteam sports such as golf or tennis, because each sport depends upon two or more individuals who compete against each other as an integral part of the sports event. Indeed, it is difficult to think of a single performer, whether an athlete or an actor, who could perform or have "value to publicize" without others to promote, to organize, to schedule, and to produce the performances. Of course, taking this argument and analysis to its logical conclusion, it is obvious that team owners and leagues would be totally incapable of staging sporting events without the players; yet the players could form their own leagues and exhibit their skills accordingly, without the current established leagues or teams.

Thus, reliance by teams or leagues on early cases like *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*,<sup>64</sup> which involved a team's right to control the broadcast of its games, appears to be of limited value. In *Pittsburgh Athletic*, the plaintiffs, who were the owners of the Pitts-

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<sup>62</sup>No. 79 Civ. 3025 (S.D.N.Y. filed June 8, 1979).

<sup>63</sup>Reply Memorandum of Manhattan Cable Television, Inc. in Support of its Motion to Dismiss the First Amended and Supplemental Complaint at 8-9, *Silas v. Manhattan Cable Television, Inc.*, No. 79 Civ. 3025 (S.D.N.Y. filed June 8, 1979).

<sup>64</sup>24 F. Supp. 490 (W.D. Pa. 1938). See also *National Exhibition Co. v. Fass*, 143 N.Y.S.2d 767 (Sup. Ct. 1955).

burgh Pirates baseball team and the assignees, sued to enjoin unauthorized radio transmissions of play-by-play accounts of the game by individuals who were operating from a vantage point outside the ballpark. In broad, sweeping language, the court granted the injunction and stated that "the exclusive right to broadcast play-by-play descriptions of the games . . . rests in the plaintiffs."<sup>65</sup> The court stated that the team had a property right in such play-by-play accounts and had the right to control its use.<sup>66</sup>

However, the sole issue in *Pittsburgh Athletic* involved the right to broadcast the play-by-play of a game by radio as between the team owners and assignees and the third parties who had no involvement in the production or playing of the game. The players were not before the court pressing their own claims; therefore, the court did not have before it, nor did it address, the rights of the team owners or their assignees vis-a-vis the players. Because the *Pittsburgh Athletic* case preceded the earliest athletes' right of publicity cases by some fifteen years, the court could hardly have been expected to raise the players' right issue *sua sponte*. Further, because the broadcasts in *Pittsburgh Athletic* related only to play-by-play reports on radio, there was no appropriation of the likeness or performance of any one or more players. There was merely an oral description of what was transpiring on the field. To the extent that the right of publicity only protects against unauthorized use of the likeness or performance of the athlete, arguably, radio would create no infringement at all regarding the individual player.<sup>67</sup>

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<sup>65</sup>24 F. Supp. at 492.

<sup>66</sup>As a formal conclusion of the law, the court stated:

2. The right, title and interest in and to the baseball games played within the parks of members of the National League, including Pittsburgh, including the property right in, and the sole right of, disseminating or publishing or selling, or licensing the right to disseminate, news, reports, descriptions, or accounts of games played in such parks, during the playing thereof, is vested exclusively in such members.

*Id.* at 493-94.

<sup>67</sup>*Accord* *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 194 A. 631 (1937). In *Waring*, the court enjoined a radio station's unauthorized broadcasts of an orchestra's recorded performances. The court stated that although the orchestra conductor and musicians contributed their parts, "none of them can claim an individual property right in the composite production. It is the corporation, the orchestra organization, which alone is entitled to assert and enforce the right of property in its renditions." *Id.* at 442, 194 A. at 635. However, the court did recognize the need for judicial flexibility to protect performers' interests in light of changing circumstances and technologies:

Just as the birth of the printing press made it necessary for equity to inaugurate a protection for literary and intellectual property, so these latter-day inventions make demands upon the creative and ever-evolving energy of equity to extend that protection so as adequately to do justice under current conditions of life.

*Id.* at 435, 194 A. at 632.

It should also be noted that one of the basic premises from which *Pittsburgh Athletic* proceeded would appear to help support a cause of action for team players. Specifically, the court in *Pittsburgh Athletic* noted that both the plaintiffs and the defendants were using the baseball news as it happened as material for profit.<sup>68</sup> The court held in favor of the team owners and their assignees because they had acquired and maintained the ballpark, had "[paid] the players who participate[d] in the game," and, therefore, had a "legitimate right to capitalize on the news value of their games by selling exclusive broadcasting rights."<sup>69</sup> The court was proceeding from the assumption that the team had paid for and obtained from its players the right to broadcast their performance.<sup>70</sup> Yet that assumption is precisely what would be challenged in a player's suit alleging violation of the right of publicity. Whether the team has that right turns upon the nature of the rights that were granted to the team in the players' contract. Based on *Ettore*, merely paying someone for the right to his performance at a live sporting event does not necessarily encompass payment to that performer as compensation for further filming or for broadcasting his performance.<sup>71</sup>

#### VI. RIGHT OF PUBLICITY IN TEAM SPORTS: THE CONTRACT AND COLLECTIVE BARGAINING APPROACH

There appears to be no reason not to apply right of publicity concepts to protect the interests of an individual professional athlete in his performance merely because he participates in a team sport, such as football or hockey, rather than in an individual sport, such as golf or boxing. The unique nature of professional sports leagues, however, can lead to confusion over the precise boundaries and enforceability

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<sup>68</sup>24 F. Supp. at 492. The use of the "news" analysis itself casts further doubt on the applicability of *Pittsburgh Athletic* in the right of publicity context. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

<sup>69</sup>24 F. Supp. at 492.

<sup>70</sup>See *id.*

<sup>71</sup>The standard form film actors' contract as agreed to by the Screen Actors Guild, the American Federation of Television and Radio Actors, and other performers' unions—quite clearly analogous to a team sport athlete's contract in terms of governing rights of one member of a larger group of employees acting in a production organized by others—has an express provision that permits a movie producer to sell the rights to the actor's performance to television and other media, thereby avoiding the *Ettore* problem. Moreover, the performers' overall collective bargaining agreements generally contain schedules that provide for payments for such ancillary performance uses in other media. The standard form professional sports contract and sport unions' collective bargaining agreements historically have not contained similar provisions. See *infra* text accompanying notes 79-83.

of an individual athlete's right of publicity in the context of a sports team's performance.<sup>72</sup>

The most sensible approach would be for the courts to view the right to profit from the broadcast of a team sport athletic event as composed of two complementary "half-rights": the players' rights in their performances, without which there could be no event; and the teams' or league's right in the event, made possible by their organization of the players' performances.

#### A. *Television Performance Rights: The Team Owners' Half and the Players' Half*

The basic products that the owners of professional sports teams produce are the actual games. In relation to nonplayer third parties, the team owners (team) own the exclusive right, title, and interest in the exploitation of the games that they produce.<sup>73</sup> As part of their franchise right, the team owners retain the sole right of selling or licensing the telecasts of the games.<sup>74</sup> An individual player in the game, however, is not precluded from asserting his property right in his own performance, which is a separate, divisible right that involves the player's personal right to exploit his own name, image, or likeness.<sup>75</sup> This personal right of exploitation is significantly different from the right of team owners to control the ultimate product, the game. The team's right to sell the television rights to this product is derived, in part, from the player's right of publicity.<sup>76</sup> Thus, in order for a

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<sup>72</sup>See *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938).

<sup>73</sup>See *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490, 492-94 (W.D. Pa. 1938). See also *National Exhibition Co. v. Fass*, 143 N.Y.S.2d 767 (Sup. Ct. 1955).

<sup>74</sup>See *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *National Exhibition Co. v. Fass*, 143 N.Y.S.2d 767 (Sup. Ct. 1955). In *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, No. 80 Civ. 3710 (N.D. Ill. filed June 14, 1982), the plaintiff baseball team owners allege that their ownership of the copyright of the telecasts of baseball games protects their right to telecast the players' pictures. This position may be countered by arguing that copyright protection creates rights only against persons who copy or misappropriate the copyrighted work. See 17 U.S.C. § 106 (Supp. V 1981). The players certainly are not in that position. Thus, the owners' copyright protection seems irrelevant to the question of whether they may use the players' names and pictures in the telecast of the ballgames.

<sup>75</sup>See *supra* text accompanying notes 32-38.

<sup>76</sup>In *Zacchini v. Scripps-Howard Broadcasting Co.*, the United States Supreme Court recognized that these rights are separable:

The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act of television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner, or to film and broadcast a prize fight, or a baseball game, where the promoters or the participants had other plans for publicizing the event.

sports producer, in this case the team, to sell the television rights to broadcast a sports contest, the producer must first obtain the right to make any particular use of the participating athlete's name, image, or likeness.<sup>77</sup> As a conceptual matter, this limitation is really no different than the limitation that is placed on the rights of a producer of a play or on other forms of live entertainment, such as a concert. No one would seriously contend that a producer could film or record the performance and sell it without the specific authorization of the performers who were involved.<sup>78</sup> It is equally apparent that absent a performer's express consent, the producer also would be precluded from authorizing the televising of the play or concert. Likewise, as to the telecast of a team sports event, it would seem that both the team owners and the players have complementary "half-rights" which must be packaged in the same way as any entertainment event that is put together by a theatrical producer.

### *B. The Grant of the Players' "Half-Right"*

The specific grant of rights clause that is contained in a player's standard form contract in the major professional team sports leagues traditionally has been very limited with respect to the use of the player's image or likeness by the team or league.<sup>79</sup> These clauses limit

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433 U.S. at 575 (citations omitted) (emphasis added). Cf. Copyright Royalty Tribunal, 1978 Copyright Royalty Distribution Determination, PAT. TRADEMARK & COPYRIGHT J. (BNA), No. CRT 79-1, at D-1 (Sept. 25, 1980). The Copyright Royalty Tribunal, established pursuant to the 1976 revisions to the Copyright Act, determined that professional sports leagues hold a copyright and are entitled to share in the revenues generated as a result of those revisions with respect to the retransmission of sports events by cable television. The Tribunal, like the courts in the early cases involving broadcasts of baseball games, *see supra* notes 64-71 and accompanying text, did not attempt or purport to address the question of individual players' rights vis-a-vis the leagues and their member teams regarding the revenues so derived. The cable television companies should be accountable to the players for cablecasts of the players' performance, just as the defendant television broadcaster was held liable to the athlete in *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

<sup>77</sup>*See, e.g.*, *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956) (boxing match); *Sharkey v. National Broadcasting Co.*, 93 F. Supp. 986 (S.D.N.Y. 1950) (boxing match).

<sup>78</sup>In an analogous situation, a model who consented to be photographed for certain posters—and who further consented that the modeling session be filmed and shown on cable television—was held to have a cause of action for violation of her right of publicity when, without her consent, other posters were made from photographs taken at the modeling session. *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981).

<sup>79</sup>The player contract of the National League of Professional Baseball Clubs provides only that

[t]he player agrees that his picture may be taken for still photographs, motion pictures, or television at such times as the Club may designate and agrees

the rights granted by the player to the use of his picture or likeness for promotional and publicity purposes, presumably contemplating such matters as ticket sales to the games in which the player has contracted to perform. There is neither an all-purposes grant of rights nor a specific grant of rights to the team or the league to broadcast or cablecast the player's performance or image in any other context.<sup>80</sup> Also the players have not granted this right directly to the television or cable companies. However, under the case law, a specific grant of rights is required in order for the right to be effectively assigned.<sup>81</sup> The mere fact that a professional athlete signs a contract to engage in professional sports does not mean that he automatically relinquishes his rights to otherwise exploit his name, image, or likeness through the media or elsewhere. For example, in *Ali v. Playgirl, Inc.*,<sup>82</sup> the court, referring to well-known boxer Muhammed Ali, held "[t]hat [plaintiff] may have voluntarily on occasion surrendered [his] privacy

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that all rights in such pictures shall belong to the Club and may be used by the Club for publicity purposes in any manner it desires.

National League of Professional Baseball Clubs, Uniform Player's Contract, ¶ 3(c). Similarly, the NBA's player contract provides:

The Player agrees to allow the Club or the Association to take pictures of the Player, alone or together with others, for still photographs, motion pictures or television, at such times as the Club or the Association may designate, and no matter by whom taken may be used in any manner desired by either of them for publicity or promotional purposes.

National Basketball Association, Uniform Player Contract, ¶ 18 (emphasis added). Similar language is contained in the standard form National Football League's player contract, National Football League, Uniform Player Contract, ¶ 4. By contrast, the National Hockey League's player contract does not limit the club's use of the player's picture to any specific purpose, publicity or otherwise, except as the collective bargaining agreement may impose from time to time. National Hockey League, Standard Player's Contract, ¶ 8(a). The North American Soccer League's standard form contract includes a specific grant of rights with respect to all forms of television, so as to include broadcast and cable television. North American Soccer League, Club-Player Agreement, ¶ 2.3.

<sup>80</sup>Cable television is not referred to at all.

<sup>81</sup>See *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), cert. denied, 351 U.S. 926 (1956); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978); *Sharkey v. National Broadcasting Co.*, 93 F. Supp. 986 (S.D.N.Y. 1950); *Norman v. Century Athletic Club, Inc.*, 193 Md. 584, 69 A.2d 466 (1949). See also *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975) (court scrutinized the contractual language in issue and found very definite limitations on the extent and duration of grants of rights); *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401, 407 (E.D. Pa. 1963) ("A sports figure can complain when his name or likeness is used to advertise a product but he can recover damages only if he has not consented to such use or the advertising exceeds the consent granted."). But see *Rooney v. Columbia Pictures Industries*, 538 F. Supp. 211 (S.D.N.Y. 1982) (contracts granted defendants all rights with respect to all films in which plaintiff appeared prior to February 1, 1960).

<sup>82</sup>447 F. Supp. 723 (S.D.N.Y. 1978).

for a price or gratuitously, does not forever forfeit for anyone's commercial profit so much of [his] privacy as [he] has not relinquished.'"<sup>83</sup>

Thus, in order for a sports team or a league to insure that it obtains the player's consent to televise or cablecast the games in which that athlete performs, the team or league should obtain the broadest possible grant of rights from the player.<sup>84</sup> The grant of rights clause should cover specifically both the type of use<sup>85</sup> and the type of medium<sup>86</sup> involved. The courts in several sports performances cases have held that even when there is no express reservation of rights as to a specific type of use or medium, a reservation may nonetheless be implied.<sup>87</sup>

Alternatively, the team owners may contract with the player for a specific grant of rights with regard to a particular use by the team of the player's name, picture, or likeness in the televising of the player's performances during the team's games.<sup>88</sup> To the extent that

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<sup>83</sup>*Id.* at 727 (quoting *Booth v. Curtis Publishing Co.*, 15 A.D.2d 343, 351-52, 223 N.Y.S.2d 737, 745, *aff'd*, 11 N.Y.2d 907, 183 N.E.2d 812, 228 N.Y.S.2d 468 (1962)). *See also* *Brinkley v. Casablancas*, 80 A.D.2d 428, 435, 438 N.Y.S.2d 1004, 1009 (1981) ("[P]laintiff's previous written consent to the use of other photographs of herself does not constitute implied authorization for the use of the photograph involved here.").

<sup>84</sup>*See, e.g.*, *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d Cir. 1968), *cert. denied*, 393 U.S. 826 (1968); *Rooney v. Columbia Pictures Industries*, 538 F. Supp. 211 (S.D.N.Y. 1982); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 838 (S.D.N.Y. 1975) (involving the assignment of all rights with respect to the exploitation of an individual or an event or series of events—a so-called "all rights" clause).

<sup>85</sup>An athlete may agree to have his picture used for publicity purposes with regard to the promotion of ticket sales, but not be deemed to have waived his rights regarding an unauthorized caricature in a magazine, inclusion of which promotes the trade of that magazine. *See Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978). *See also* *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981).

<sup>86</sup>A grant of rights to make a motion picture of a sports performance has been held not to include the right to broadcast those pictures as part of a television show. *Ettore v. Philco Television Broadcasting Co.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *Sharkey v. National Broadcasting Co.*, 93 F. Supp. 986 (S.D.N.Y. 1950). Similarly, a grant of rights for radio broadcasts of boxing matches was held not to include the right to telecast boxing matches from the same arena. *Norman v. Century Athletic Club, Inc.*, 193 Md. 584, 591, 69 A.2d 466, 468-69 (1949). *Contra* *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 (2d Cir. 1968).

<sup>87</sup>*See* *Ettore v. Philco Television Broadcasting Co.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *Sharkey v. National Broadcasting Co.*, 93 F. Supp. 986 (S.D.N.Y. 1950); *Norman v. Century Athletic Club, Inc.*, 193 Md. 584, 69 A.2d 466 (1949); *Kirk La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 188 N.E. 163 (1933). *But see* *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d Cir. 1968).

<sup>88</sup>One recent player contract between an NBA player and the New York Knickerbockers provides: "The Player hereby grants to the Club the full and complete right to use, and permit others to use, his name, picture, and likeness in connection with the broadcasting, telecasting, cablecasting or other exploitation of any and all games and practices of the club during the term hereof." Affidavit of Lawrence Fleisher,

the individual grant of rights clauses are limited to promotion and publicity purposes in the standard form contracts that are currently in use in most sports leagues, the players would appear not to have granted or would appear to have impliedly reserved their rights in their performances, both as to the local broadcast and cable television which is controlled by the individual team owners, and as to the network broadcast and cable television which are controlled by the league.

*C. Contentions of Waiver of the Players' "Half-Right"*

For nearly a quarter of a century, players in all of the major professional team sports have had their names, images, or likenesses used in the television broadcast media without their express consent.<sup>89</sup> However, the cases dealing with the publicity rights of professional athletes in their actual performances have not yet involved players in team sports. This fact may lead league representatives and franchise owners in major professional team sports to conclude that the players' rights to exploit their names, images, or likenesses through the broadcast television media<sup>90</sup> with respect to the games in which the players perform should be precluded by the players' implied consent or by various equitable doctrines. These conclusions, however, should not survive judicial scrutiny.

The sports team owners may argue that, even though the grant of rights clause that is contained in the player's uniform 'player contract is limited to publicity and promotional purposes,<sup>91</sup> it has always been understood in the professional teams sports industry that by signing the player contract and by agreeing to perform in the team's games, the player has assigned whatever rights he may have in that performance to the team or the league. In effect, the team owners may contend that because a substantial part of the players' salaries are paid by the team from revenues received by the team from the sale of these television rights, the players should be deemed to have impliedly consented<sup>92</sup> to the use of their names, images or likenesses

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Esq., In Opposition to Motion to Dismiss (Exhibit D), *Silas v. Manhattan Television, Inc.*, No. 79 Civ. 3025 (S.D.N.Y. filed June 8, 1979). These principles apply with respect to both the individual teams' local television licensing contracts and the network television contracts which are ordinarily entered into by a league on behalf of all of its teams. Although an individual player generally signs a player contract with an individual club, that contract ordinarily must be approved by the league office and contains provisions dealing with league as well as with individual club regulations.

<sup>89</sup>See, e.g., *National Exhibition Co. v. Fass*, 143 N.Y.S.2d 767 (Sup. Ct. 1955). Team sports have been telecast since the early 1950's.

<sup>90</sup>Cable television must be treated somewhat differently. See *infra* note 104.

<sup>91</sup>See *supra* note 79.

<sup>92</sup>See W. PROSSER, *supra* note 13, § 117. The team owners also may argue that,

in television broadcasts, particularly because the players signed these contracts with full knowledge of the practice of televising games and they played in the games knowing the games would be televised.<sup>93</sup> In addition, sports leagues and team owners may contend that in light of the twenty-five years of televising games, the players have waived or are estopped from asserting their rights of publicity in their performances.

To the extent there has been any implied consent, the consent can simply be withdrawn.<sup>94</sup> Waiver requires a voluntary and intentional abandonment of a known right, claim, or privilege,<sup>95</sup> and mere passivity is not in itself a waiver of rights.<sup>96</sup> In the professional team

over the last decade or more, the players have either bargained away or waived these rights as part of their collective bargaining negotiations. *See* Baltimore Orioles, Inc. v. Major League Baseball Players Association, No. 82 Civ. 3710 (N.D. Ill. filed June 14, 1982).

<sup>93</sup>The court in *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1956), alluded to this concept, albeit not in the professional sports context, in which express contractual provisions would be determinative: "Today also, for example, if there be telecasts of an intercollegiate football game, the players, knowing or having reasonable grounds to know that the contest was being telecast, would be presumed to have waived any right to compensation for their performances by participating in the contest." 229 F.2d at 487. This dictum, however, appears to have been meant to clarify the distinction between new and known mediums, for nothing else in the opinion in any way supports the view that a party that grants only certain rights by contract has waived his other, not-granted rights. In addition, this language would not appear to preclude an action for prospective declaratory or injunctive relief, as opposed to money damages for past injury. *See infra* note 98.

<sup>94</sup>62 AM. JUR. 2d *Privacy* § 20 (1972). *See, e.g.*, *Garden v. Parfumerie Rigaud, Inc.*, 151 Misc. 692, 271 N.Y.S. 187 (Sup. Ct. 1933). In *Garden*, the court found that the plaintiff could revoke, at any time during the 20-year agreement, her gratuitous consent to the defendant's use of her name and picture in connection with its perfume:

The court cannot lend itself to defendant's claim that, having trade-marked the article and invested considerable money to popularize it, no revocation is possible. It may well be that by revocation serious impairment of business results. But that is a danger and risk assumed in accepting a consent unlimited as to time and against which, in the beginning, guard could easily be had.

*Id.* at 693, 271 N.Y.S. at 189. The same rationale would appear applicable with respect to teams' arguments regarding the players' rights in their performances. *See supra* notes 79 & 88. The insufficiency of an "understanding," or even an express oral consent, is particularly clear under New York law, because N.Y. CIV. RIGHTS LAW, §§ 50-51 (McKinney 1976), which has been held to encompass the right of publicity, requires *written* consent. Furthermore, a New York court has held that "[o]ral consent is not a defense and is relevant only on the question of damages. 'Neither oral consent nor estoppel is a complete defense; they are available only as partial defenses in mitigation of damages.'" *Brinkley v. Casablancas*, 80 A.D.2d 428, 434, 438 N.Y.S.2d 1004, 1009 (1981) (quoting *Lomax v. New Broadcasting Co.*, 18 A.D. 229, 229, 238 N.Y.S.2d 781, 781 (1963)).

<sup>95</sup>28 AM. JUR. 2d *Estoppel and Waiver* §§ 30, 154 (1966).

<sup>96</sup>*Id.* § 160. *See, e.g.*, *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 846-47 (S.D.N.Y. 1975).

sports field, the history of players' express reservations regarding television rights over the last ten years further reveals the weakness of a waiver theory.<sup>97</sup> Similarly, mere silence or inaction would not necessarily give rise to an estoppel situation.<sup>98</sup> The applicability of estoppel concepts to this issue is particularly questionable because sports leagues and teams do not make significant expenditures for television equipment in reliance on the players' supposed implied consent,<sup>99</sup> but rather merely enter into contracts permitting third parties such as television networks and local television stations, which already have equipment and trained employees, to televise the games. These contracts have fixed terms and may be renewed or may expire depending upon the desires not only of the team or league, but also of the network.<sup>100</sup> Because the players' consent is not determinative of the team's or league's ability to televise the games, estoppel appears to be an erroneous basis for denying the players' rights.

Finally, in light of the peculiar nature of the team sports industry in the United States, the concepts of implied consent, waiver, and estoppel may be entirely inapplicable. The games of all major professional leagues are televised; thus, the athlete who wishes to play major league professional sports has no choice but to play for a team or league which will televise his performance. He cannot avoid the telecast without foregoing his athletic career entirely or without "sitting out" the prime of his career while right of publicity litigation winds its way through the courts. In such circumstances, the equitable doctrines which the sports leagues and teams may raise are of dubious applicability.<sup>101</sup>

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<sup>97</sup>See *infra* note 105 and accompanying text.

<sup>98</sup>28 AM. JUR. 2d *Estoppel and Waiver* § 53, at 667, 669 (1966). See generally *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981). Cf. *New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.*, 1981 COPYRIGHT L. REP. (CCH) ¶ 25,293 at 16,625 (D. Mass. Aug. 3, 1981). In enjoining the defendant from copying and retransmitting to cable television systems excerpts of the plaintiff's copyrighted broadcasts of sporting events, the court rejected the defendant's claim that an injunction was inappropriate because the plaintiff had never made any efforts to sell excerpts of its broadcasts to cable stations in the past: "Assuming it to be true . . . this does not permit defendants to appropriate plaintiff's copyrighted material and effectively preclude such efforts in the future. *It is for plaintiffs, not defendants, to determine when and in what manner they choose to exploit their copyright.*" *Id.* at 16,627 (emphasis added).

<sup>99</sup>See 28 AM. JUR. 2d *Estoppel and Waiver* § 55 (1966).

<sup>100</sup>To the extent a sports league or team is a party to a television broadcasting contract currently in effect, the courts may recognize an estoppel to the point of allowing the contract to run its course. See *Garden v. Parfumerie Rigaud, Inc.*, 151 Misc. 692, 271 N.Y.S. 187 (Sup. Ct. 1933) (permitting a manufacturer to sell those products which it already had produced or had commenced to manufacture in reliance on the plaintiff's consent).

<sup>101</sup>Further, it is difficult to see how a waiver outside the collective bargaining

In light of these considerations, players in professional team sports today and in the future should be held to have a protected property right in the value of their performances, without regard to the precise medium in question.<sup>102</sup>

In addition, an examination of the waiver and consent issues cannot be limited to the precise aspect of the publicity in question, for example live performance as opposed to photographs or statistics,<sup>103</sup> but also must be examined with regard to the type of medium involved, such as movies, broadcast television, or cable television. This latter consideration is of great importance in professional team sports today. Even if the players' rights to exploit their names, images, or likenesses and to seek additional compensation for their performances with regard to broadcast television is deemed to have been waived, the waiver theory would not appear to be applicable to the new and burgeoning cable television industry. In the context of the exploitation of sports performance rights, cable television is and must be considered a relatively new, and certainly a separate, medium.<sup>104</sup> To the

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arena by any individual or group of professional athletes could be deemed a waiver by, or estoppel as to all future professional athletes, such as, current amateur and college stars who have not yet signed their first professional contracts.

<sup>102</sup>Players in certain team sports already do share, to a limited degree, in the revenues from traditional broadcast television. For example, under the Major League Baseball Players Benefit Plan, television revenues from the All-Star games are paid directly to the players' pension fund. See Basic Agreement between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and Major League Baseball Players Association—(Jan. 1, 1980). However, such sharing appears to have been derived from the general give-and-take of the collective bargaining process, rather than from right of publicity considerations. There is no reason why unions could not collectively bargain for a greater share of such television revenues as are already shared with the players by the owners, just as there is no reason why, absent an agreement reached through such bargaining, players could not bring suit to recover a share of such funds.

<sup>103</sup>The court in *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970), specifically noted that professional athletes do not waive their rights of publicity in all respects, despite the broad use and availability of aspects of their personality in certain ways. *Id.* at 1282-83. Thus, in rejecting claims that the names and statistics of professional baseball players were not protected from use in a board game, the court stated: "Defendants' contention has no merit that by publication in the news media and because of the ready availability to anyone of the names and statistical information concerning the players, such information is in the public domain and the players thus have waived their rights to relief in this case." *Id.* Accord *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72, 76, 232 A.2d 458, 460 (1967).

<sup>104</sup>A special Presidential committee concluded a few years ago that "cable is not merely an extension or improvement of broadcast television. It has the potential to become an important and entirely new communications medium, open and available to all." THE CABINET COMMITTEE ON CABLE COMMUNICATIONS, REPORT TO THE PRESIDENT 13 (1974). See also *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977). See generally, SUBCOMMITTEE ON COMMUNICATIONS OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE 94th

extent that the long history of television broadcasting of professional sports may impair the players' ability to exploit their rights of publicity in the future with respect to that medium, there is no such extended history of cablecasting of team sports events.<sup>105</sup>

This conclusion is supported by several courts that have expressly declined to find a waiver of an individual's right to exploit his publicity rights in a new and previously unforeseen way.<sup>106</sup> In *Ettore v. Philco Television Broadcasting Corp.*,<sup>107</sup> the plaintiff contracted to receive twenty percent of the proceeds from the sale of the motion picture rights to his boxing match with Joe Louis. Approximately fifteen years after both the fight and the plaintiff's receipt of the royalties from the sale of the movie, part of the film was televised as a segment of a television program. The defendants moved to dismiss the action, contending that Ettore had consented in advance to any use that could be made of the film by contracting for the sale of the motion picture rights. The defendants' motion was granted.<sup>108</sup> On appeal, the Third Circuit reversed, holding that Ettore had a right to proceeds of the telecast and that he had not waived his television rights by contracting for the sale of the motion picture rights.<sup>109</sup> The court stated that "[f]airness would seem to require that a court treat the absence of the new or unknown media, television in the instant case, as about the equivalent of a reservation against the use of the work product of the artist or performer by a known medium . . . ." <sup>110</sup>

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CONG., 2d SESS., CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE (1976); Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366 (1965); Note, *The Federal Communications Commission and Regulation of CATV*, 43 N.Y.U. L. REV. 117 (1968).

<sup>105</sup>The professional basketball players have specifically reserved their rights with respect to cable television for approximately a decade. National Basketball Players Association Agreement Art. XVIII (Apr. 29, 1976). The same provision appears in the succeeding October, 1980 agreement. National Basketball Players Association, Collective Bargaining Agreement Art. XVIII § 1 (Oct. 10, 1980). In addition, in 1980, the players agreed not to sue the NBA or its teams or assignees regarding cable television and similar media until 1987, *id.* § 2, but reserved the right to collectively bargain concerning cable television revenues in the interim, *id.* § 3. The baseball players have a similar reservation of rights. Basic Agreement between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and Major League Baseball Players Association—(Jan. 1, 1980).

<sup>106</sup>*E.g.*, *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1956); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970).

<sup>107</sup>126 F. Supp. 143 (E.D. Pa. 1954), *aff'd*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

<sup>108</sup>126 F. Supp. at 151.

<sup>109</sup>229 F.2d at 487-91.

<sup>110</sup>*Id.* at 491. The *Ettore* court, whose holding in this regard was recently reaffirmed in *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 149 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1715 (1982), reviewed the applicable cases, the majority of which held that a performer will not be deemed to have granted his rights regarding a use or medium

*D. Effect of Collective Bargaining on  
Professional Athletes' "Half-Right"*

Another important consideration that must be factored into the question of the enforceability of players' rights with regard to broadcast and cable television is the extent to which those rights may be affected by collective bargaining in professional sports in general and by the particular bargaining history in each of the team sports involved. The players' associations or unions in many professional sports have become increasingly powerful in recent years.<sup>111</sup> Thus, the extent

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which was not in existence or contemplated at the time the contract was made. 229 F.2d at 487-88. See *Manners v. Morosco*, 252 U.S. 317 (1920); *Capital Records, Inc. v. Mercury Record Corp.*, 221 F.2d 657, 663 (2d Cir. 1955); *Norman v. Century Athletic Club*, 193 Md. 584, 69 A.2d 466 (1949). See also *Redmond v. Columbia Pictures Corp.*, 277 N.Y. 707, 14 N.E.2d 636 (1938); *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 183 N.E. 163 (1933); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937). One case, *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d Cir. 1968), however, held that the plaintiff, an experienced businessman, did waive his rights regarding the telecast of a film by entering into a contract containing a very broad contractual grant of his rights to the movie. In *Bartsch*, the Second Circuit distinguished *Ettore*, stating that Ettore was a boxer and not an experienced businessman. The court concluded that although

New York will not charge a grantor with the duty of expressly saving television rights when he could not know of the invention's existence, we have found no cases holding that an experienced businessman . . . is not bound by the natural implications of the language he accepted when he had reason to know of the new medium's potential.

391 F.2d at 154. The *Bartsch* case would appear to be inapplicable to the situation involving professional team sports for at least two reasons: (1) in team sports, as in *Ettore*, the players are professional athletes, often without a college education or are fresh out of college when they sign their contracts, and, therefore, are not experienced businessmen; and, more importantly, (2) in most if not all sports, unlike the situation presented in the contract in *Bartsch*, there is no broad contractual grant of rights. The grant of the rights in most professional sports contests is expressly limited to the use of a photograph for publicity and promotional purposes rather than live performance, and contains no reference to cable or other forms of pay television. See also *Wexley v. KTTV*, 108 F. Supp. 558 (S.D. Cal. 1952), *aff'd*, 220 F.2d 438 (9th Cir. 1955); *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981). The distinction between cable and broadcast television, and the recognition by the judiciary and team owners themselves of the fact that a grant of rights with respect to one medium is not a grant of rights as to all, is revealed in *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 534 F. Supp. 533 (N.D.N.Y.), *rev'd on other grounds*, 691 F.2d 125 (2d Cir. 1982), *cert. denied* 51 U.S.L.W. 3601 (1983) (No. 82-957). See also *New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.*, 1981 COPYRIGHT L. REP (CCH) ¶ 25,293 at 16,625 (D. Mass. Aug. 3, 1981).

<sup>111</sup>See *supra* note 4 and accompanying text. The players' associations today generally obtain an assignment of certain of their members' rights on a limited basis for the express purpose of exploiting those rights for the benefit of all union members. They may also agree not to exploit certain of their member's rights in this regard. See, e.g., *supra* note 105. See generally *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1715 (1982), for an example of such assignment of rights.

to which the issue of broadcast and cable television rights has been, and will be, involved in collective bargaining in professional sports must also be analyzed.

Under the relevant labor laws,<sup>112</sup> parties in a collective bargaining relationship are obligated to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment."<sup>113</sup> Further, it is well established that anything that is encompassed by the phrase "wages, hours, and other terms and conditions of employment" is a mandatory subject about which either party must bargain upon request, but about which neither party is obligated to make concessions.<sup>114</sup> In the event that a refusal to make concessions produces a bargaining impasse, an employer may, in most instances, institute unilateral changes in terms of employment, provided that such changes are consistent with the proposal over which the employer bargained to impasse.<sup>115</sup> Examples of such mandatory bargaining subjects include wages,<sup>116</sup> pension benefits,<sup>117</sup> profit sharing plans,<sup>118</sup> vacations,<sup>119</sup> sick leave,<sup>120</sup> and subcontracting that leads to the replacement of bargaining unit employees.<sup>121</sup>

In addition to mandatory subjects about which the parties must bargain, there are also permissive bargaining subjects about which the parties are free to bargain or not to bargain, as they see fit.<sup>122</sup> Among the more commonly bargained about permissive subjects are performance bonds,<sup>123</sup> internal union matters, such as the procedures for authorizing a strike,<sup>124</sup> and the settlement of Labor Board cases and court cases that are pending between the parties.<sup>125</sup> Finally, there are subjects about which it is illegal to bargain, such as contract clauses that are outlawed by the National Labor Relations Act.<sup>126</sup>

<sup>112</sup>The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1982).

<sup>113</sup>*Id.* § 158(n)(5), (b)(3), (d).

<sup>114</sup>*See* NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1958) (citing NLRB v. American Ins. Co., 343 U.S. 395 (1952)).

<sup>115</sup>NLRB v. Almeida Bus Lines, Inc., 333 F.2d 729 (1st Cir. 1964); Eddie's Chop House, Inc., 156 N.L.R.B. 861 (1967).

<sup>116</sup>American Laundry Machinery Co., 107 N.L.R.B. 1574 (1954).

<sup>117</sup>Inland Steel Co., 77 N.L.R.B. 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

<sup>118</sup>Dickten & Masch Mfg. Co., 129 N.L.R.B. 112 (1960).

<sup>119</sup>Great Southern Trucking Co. v. NLRB, 127 F.2d 180 (4th Cir.), *cert. denied*, 317 U.S. 652 (1942).

<sup>120</sup>NLRB v. Katz, 369 U.S. 736 (1962).

<sup>121</sup>Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

<sup>122</sup>*See* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

<sup>123</sup>Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952).

<sup>124</sup>NLRB v. Corsicana Cotton Mills, 178 F.2d 344 (5th Cir. 1949).

<sup>125</sup>Jefferson Standard Broadcasting Co., 94 N.L.R.B. 1507 (1951).

<sup>126</sup>29 U.S.C. § 158(e) (1976). That section provides, in pertinent part:

It should be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby

The subject of television and cable rights is clearly not an illegal subject and it would certainly be proper for the owners and union to bargain about such rights and the allocation of income therefrom. Whether the issue of the grant of player's rights of publicity in their performances is a permissive, rather than mandatory, subject of bargaining is not clear. However, absent an enforceable covenant not to sue that is entered into by the union on behalf of itself and its members, the resolution of this mandatory versus permissive subject does not appear to be determinative of the players' ability to assert their individual property rights regarding television.<sup>127</sup> Given the need for the leagues to establish uniform guidelines regarding their rights and their teams' rights to broadcast games, and given the players' opportunity to better enforce their own rights in this regard through joint action, collective bargaining would seem to provide the most logical means for teams and leagues to resolve disputes in this area.<sup>128</sup>

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such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . .

*Id.*

<sup>127</sup>The unique bargaining structure of professional sports is another factor that must be taken into account in this regard. Many of the critical terms of employment in professional sports such as salary, contract provisions, and the team's right of termination are, to a large extent, the subject of individual negotiations between the player and team, following the establishment of minimum standards through collective bargaining. A player's property rights in his own performance could probably be negotiated either collectively or on an individual basis. See *supra* note 79 & 88 and accompanying text. It should also be noted that there is no reason why a collective bargaining agreement could not provide for certain payments to the players' association for the right to televise players' performances at the same time that a popular, well-publicized player's individual contract provides for additional compensation based on the team's television revenue and attendance. One problem that can more readily be handled in collective bargaining is the question of the rights of future players, because the players' association, as bargaining agent, can bind all of its members, present and future.

<sup>128</sup>The recent strike by members of the Screen Actors Guild (SAG) provides a likely script for developments in professional team sports. SAG had attempted to obtain a share of revenues from, *inter alia*, pay television contracts entered into by television and movie companies with pay television operators. When these efforts were unsuccessful, SAG called a strike. See Lindsey, *Movie and TV Actors Strike*, N.Y. Times, July 22, 1980, at 7, col. 1. Ultimately, the strike was ended when the actors obtained a small share of the revenues in further collective bargaining. Harmetz, *Actors Approve Contract*, N.Y. Times, Oct. 24, 1980, at C14, col. 5-8; *A Small Victory for Striking Actors*, BUS. WK., Oct. 6, 1980, at 40. Based on the recent experience in baseball, it should be observed that the pressure of a strike in professional sports on leagues and teams would likely be far greater than the pressure from the SAG strike on television and movie companies. Television and movie companies continued to operate and to earn revenues from reruns and rereleases. A sports league cannot survive long without

It also should be noted that in past player cases, it was argued by the team owners that the players' protection from the "freedom" practices at issue, such as the college draft, option clauses, and compensation rights, were not afforded by and, indeed, were exempt from the antitrust laws because the practices involved mandatory subjects of collective bargaining.<sup>129</sup> In the right to publicity case, by contrast, no exemption, antitrust or otherwise, that would limit the players' rights of publicity could be asserted by the owners. Any labor law defense to an action by the players most probably would be based only on a claim that the individual rights of the players under statutory or common law have been contracted away or waived by their collective bargaining representative.<sup>130</sup>

Further, assuming *arguendo* that television and cable rights are a mandatory subject of bargaining, these rights would seem to belong to the more narrow category of bargaining subjects about which an employer may not institute unilateral changes, even after the parties have reached an impasse.<sup>131</sup> An example of such a narrow category

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any live games and with televised replays of last season's contests. *See supra* note 4 and accompanying text.

<sup>129</sup>These arguments have repeatedly been rejected by the courts. *See Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1979); *Mackey v. NFL*, 543 F.2d 606 (3d Cir. 1976); *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615 (8th Cir. 1976); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975), *settlement approved*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

<sup>130</sup>A determination as to whether television rights are a mandatory or permissive subject of bargaining would provide no answer to the question whether a players' union has bargained away or waived the rights of its members. That question can only be answered by reviewing the contracts and bargaining history between the owners and the players in each of the major team sports leagues as they relate to both broadcast and cable television rights. For example, the players in basketball have expressly reserved their rights on cable television for many years. The basketball players recently agreed to reserve their right to collectively bargain, but not to sue to enforce those rights until 1987. *See supra* note 105. It should also be noted that if the right to broadcast or cablecast players' performances is a mandatory subject of collective bargaining, the players' right and the leagues' obligation to collectively bargain about it would arise each time a collective bargaining agreement expired and this would obviate any claim of waiver or consent, which a league or team owners might otherwise attempt to raise as to past negotiations.

<sup>131</sup>As a general proposition, if the parties to a collective bargaining agreement bargain to impasse about a mandatory subject of bargaining, the employer is free to institute unilateral changes in the agreement, consistent with the proposal over which it reached impasse. *See supra* note 115 and accompanying text. For example, owners could bargain to impasse over a proposal to lower the minimum starting salary in the league from \$30,000 to \$20,000 per season. Upon impasse, the owners would be within their rights to unilaterally lower the starting salary, consistent with their final offer, to \$20,000. The fact that the players were formerly guaranteed a minimum starting salary of \$30,000 and would be losing \$10,000 of their guarantee would have no effect upon the owners' right to institute the unilateral change in salary.

of mandatory bargaining subjects is a "no-strike" clause, over which the parties may bargain to impasse.<sup>132</sup> If an employer bargained to impasse over a proposal for a no-strike clause, it would not have a right to unilaterally institute a no-strike provision. Although employees are free to bargain away their right to strike for the duration of a collective bargaining agreement, the right to strike is guaranteed by Chapter 7 of the National Labor Relations Act and cannot be taken unilaterally by an employer.<sup>133</sup> Similarly, it would appear that the publicity rights that each player possesses under statutory or common law could not unilaterally be taken away by the owners, even if the players did first bargain to impasse over a proposal to grant all or part of their rights to the owners. Moreover, such bargaining should not bar the players from enforcing their individual rights against third parties such as television networks or cable television companies, that attempt to televise games, images, or likenesses without first obtaining permission directly from the players.

### CONCLUSION

Both professional athletes and professional sports teams and promoters have recognized interests in the players' names and likenesses and in the events in which the players are involved. Yet it may be that only by combining their respective rights that these sports events can be fully exploited and that the substantial compensation realized therefrom can be fairly apportioned among players and owners. Although recourse to litigation has proven to be a useful means of establishing the basic ground rules that concern the rights of all of the interested parties, the ultimate resolution of the parties' positions likely will be the product of contracts that result from arm's-length negotiations, and, in the case of team sports, most probably through collective bargaining.

The leagues and teams should attempt to resolve these issues through collective bargaining. If the players are forced to seek recourse in the courts, under the existing and developing case law, the leagues and teams may well learn the hard way that, in fact, it is they who must seek a share of the ever-increasing television and cablevision revenues from the players. It is the *players* who have the right to receive those revenues or to prevent the broadcasts entirely.

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<sup>132</sup>*In re Shell Oil Co., Inc.*, 77 N.L.R.B. 1306 (1948).

<sup>133</sup>The National Labor Relations Act, 29 U.S.C. § 163 (1976).

# Notes

## *Edgar v. MITE Corp.*: The Death Knell for the Indiana Takeover Offers Act

### I. INTRODUCTION

Since 1968 when the first state business takeover law was passed,<sup>1</sup> state regulation of tender offers, a weapon in the battle for corporate control, has gone forward under a constitutional cloud.

The federal law in this area is the Williams Act,<sup>2</sup> which was enacted by Congress in 1968 to bridge the regulatory gap in the Securities Exchange Act of 1934<sup>3</sup> as it affected tender offers<sup>4</sup> for the

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<sup>1</sup>Virginia passed the first state business takeover law in 1968. VA. CODE §§ 13.1-528 to -541 (1978 & Supp. 1982).

<sup>2</sup>15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. V 1981). The Williams Act amended the Securities Exchange Act of 1934 by adding new sections 13(d), 13(e) and 14(d)-(f). The Williams Act required certain disclosures by investors who sought to gain control of a corporation through the use of a tender offer rather than the use of the more traditional takeover weapon, the proxy fight. Included in the scope of the law are attempted takeovers of companies traded on a national securities exchange or of companies having both one million dollars in assets and 500 shareholders. 15 U.S.C. § 78m(d)(1). The disclosure provisions of the Williams Act apply to any investor who, as a result of the tender offer, would own more than 5% of a class of stock subject to the acquisition. *Id.* The investor must file a disclosure statement with the Securities and Exchange Commission (SEC) within 10 days after the purchase that raises his holdings above the 5% threshold. *Id.* The disclosure statement must detail the background, identity, residence, and citizenship of the individuals making the purchase or on whose behalf the purchases were made, *id.* § 78m(d)(1) (Supp. V 1981); the source and amount of financing for the stock purchase, *id.* § 78m(d)(1)(B); the plans the investors have for the target company, including merger, liquidation, or sale of assets, if the purpose of the acquisition is to obtain control, *id.* § 78m(d)(1)(C); and information about any contracts, understandings, or arrangements with anyone relating to the target company's securities, *id.* § 78m(d)(1)(E).

The Williams Act further regulates the procedure of the tender offers and provides protections for shareholders who tender their stock. A shareholder in the target company may withdraw any of his shares tendered for sale, within the first seven days of the offer, *id.* § 78n(d)(5). If the offeror has not yet purchased the shares, the shareholder may withdraw his shares at any time after 60 days from the date of the original offer. *Id.* The seven-day redemption period has been extended by the SEC to 15 business days. 13 C.F.R. § 240.14d-7(a)(1) (1982). If more shares are tendered than the bidder sought to purchase, the Williams Act requires that those shares tendered within the first 10 days be purchased on a pro rata basis. 15 U.S.C. § 78n(d)(6).

<sup>3</sup>15 U.S.C. §§ 78a-78kk (1976).

<sup>4</sup>The Williams Act did not define the term "tender offer." However, one writer, cited with approval by the United States Supreme Court in *Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982), has defined the term as "a publicly made invitation addressed

purchase of shares in a target corporation. Through the Williams Act, Congress sought to protect investors by requiring full disclosure;<sup>5</sup> yet, the disclosure process is intended to favor neither the target company nor the offeror.<sup>6</sup>

In enacting the Williams Act, Congress did not specifically bar the states from setting up their own regulatory schemes for tender offers. Congress left intact another section of the Securities Exchange Act of 1934 which stipulates that "[n]othing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."<sup>7</sup> In the years after the enactment of the Williams Act, thirty-seven states enacted their own laws regulating tender offers and takeover bids.<sup>8</sup> The stated pur-

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to all shareholders of a corporation to tender their shares for sale at a specified price." *Id.* at 2633 n.1 (quoting Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973)).

<sup>5</sup>As the United States Court of Appeals for the Fifth Circuit explained in *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), "[t]he function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself." *Id.* at 1276. Similarly, in *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980), the court of appeals observed, "Congress contemplated only that investors be protected from acting in ignorance, not from their own well-informed choice." *Id.* at 494.

<sup>6</sup>As Senator Williams told his colleagues:

I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case.

113 CONG. REC. 854, 854-55 (1967).

<sup>7</sup>15 U.S.C. § 78bb(a) (1976). While Congress was considering the Williams Act, the State of Virginia enacted its own takeover statute. VA. CODE §§ 13.1-528 to -541 (1978 & Supp. 1982). The Virginia statute took effect March 5, 1968. The effective date of the Williams Act was July 19, 1968. However, there is no indication that Congress was aware of the existence of the Virginia statute when it was considering the Williams Act. *Edgar v. MITE Corp.*, 102 S. Ct. at 2635 n.6.

<sup>8</sup>ALASKA STAT. §§ 45.57.010 to .120 (1980); ARK. STAT. ANN. §§ 67-1264 to -1264.14 (1980); COLO. REV. STAT. §§ 11-51.5-101 to -108 (Supp. 1982); CONN. GEN. STAT. ANN. §§ 36-456 to -468 (West Supp. 1981); DEL. CODE ANN. tit. 8, § 203 (Supp. 1982); FLA. STAT. ANN. §§ 517.35 to .363 (West Supp. 1978) (repealed 1979); GA. CODE ANN. §§ 22-1901 to -1915 (1977 & Supp. 1982); HAWAII REV. STAT. §§ 417E-1 to -15 (1976); IDAHO CODE §§ 30-1501 to -1513 (1980 & Supp. 1981); ILL. REV. STAT. ch. 121½, §§ 137.51 to .70 (Supp. 1982); IND. CODE §§ 23-2-3.1-0.5 to -11 (1982); IOWA CODE ANN. §§ 502.211 to .215 (Supp. 1982-1983); KAN. STAT. ANN. §§ 17-1276 to -1285 (1974 & Supp. 1980);

pose of these supplemental state provisions was investor protection. Usually unstated, but nonetheless apparent from the thrust of the laws, was the desire to protect home-state companies against takeovers from outside corporations.<sup>9</sup>

Almost immediately questions arose as to whether the new state takeover laws could coexist with the federal regulatory approach under the Williams Act and the constitutional strictures of the commerce clause.<sup>10</sup> These questions focused primarily on the potential conflict

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KY. REV. STAT. ANN. §§ 292.560 to .991 (Bobbs-Merrill 1981); LA. REV. STAT. ANN. §§ 51:1500 to :1512 (West Supp. 1982); ME. REV. STAT. ANN. tit. 13, §§ 801-817 (Supp. 1980-1981); MD. CORPS. & ASS'NS CODE ANN. §§ 11-901 to -908 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 110C, §§ 1-13 (West 1982-1983); MICH. COMP. LAWS ANN. §§ 451.901 to .917 (Supp. 1982-1983); MINN. STAT. ANN. §§ 80B.01 to .13 (West Supp. 1982); MISS. CODE ANN. §§ 75-72-101 to -121 (Supp. 1982); MO. ANN. STAT. §§ 409.50 to .565 (Vernon 1979); NEB. REV. STAT. §§ 21-2401 to -2417 (1977); NEV. REV. STAT. §§ 78.376 to .3778 (1979) (amended 1981); N.H. REV. STAT. ANN. §§ 421-A:1 to :15 (Supp. 1979) (repealed 1981); N.J. STAT. ANN. §§ 49:5-1 to -19 (West Supp. 1982-1983); N.Y. BUS. CORP. LAW §§ 1600-1614 (McKinney Supp. 1982-1983); N.C. GEN. STAT. §§ 78B-1 to -11 (1981); OHIO REV. CODE ANN. § 1707.041 (Page Supp. 1980); PA. STAT. ANN. tit. 70, §§ 71-85 (Purdon Supp. 1982-1983); S.C. CODE ANN. §§ 35-2-10 to -110 (Law. Co-op. Supp. 1982); S.D. COMP. LAWS ANN. §§ 47-32-1 to -47 (Supp. 1982); TENN. CODE ANN. §§ 48-2101 to -2114 (1979 & Supp. 1982); Texas Administrative Guidelines for Minimum Standards in Tender Offers §§ 065.15.00.100 to .800, *reprinted in* 3 BLUE SKY L. REP. (CCH) ¶¶ 55,671-55,682; UTAH CODE ANN. §§ 61-4-1 to -13 (1978 & Supp. 1981); VA. CODE §§ 13.1-528 to -541 (1978 & Supp. 1982); WIS. STAT. ANN. §§ 552.01-.25 (West Supp. 1982).

In general, the state takeover laws have sought to supplement the Williams Act by requiring more disclosure. *See, e.g.*, ALASKA STAT. § 45.57.020(c); GA. CODE ANN. § 22-1902(b); IDAHO CODE § 30-1503(2); ILL. REV. STAT. ch. 121½, § 137.54C; KY. REV. STAT. ANN. § 292.570; ME. REV. STAT. ANN. tit. 13, § 803(2); MASS. GEN. LAWS ANN. ch. 110C, § 4; NEV. REV. STAT. § 78.3771(1); N.Y. BUS. CORP. LAW § 1603(a); PA. STAT. ANN. tit. 70, § 75; TENN. CODE ANN. § 48-2104.

Other provisions varied the terms for redemption. *See, e.g.*, ALASKA STAT. § 45.57.010; COLO. REV. STAT. § 11-51.5-103(c); HAWAII REV. STAT. § 417E-2(2); LA. REV. STAT. ANN. § 51:1504A; ME. REV. STAT. ANN. tit. 13, § 809(1); MASS. GEN. LAWS ANN. ch. 110C, § 7; NEV. REV. STAT. § 78.3772(2); N.C. GEN. STAT. § 78B-3(1).

Usually, state laws added obstacles to the tender offer, such as requiring hearings before the state securities commissioner or a similar officer. *See, e.g.*, ALASKA STAT. § 45.57.020(a); CONN. GEN. STAT. ANN. §§ 36-460, -461; GA. CODE ANN. § 22-1902(e), (f); IDAHO CODE § 30-1503(4), (5); KAN. STAT. ANN. § 17-1277(a); ME. REV. STAT. ANN. tit. 13, § 804; MINN. STAT. ANN. § 80B.03(4)-(5); N.J. STAT. ANN. § 49:5-4(b); PA. STAT. ANN. tit. 70, § 74(d), (e); TENN. CODE ANN. § 48-2104(4), (5); WIS. STAT. ANN. § 552.05(4), (5).

Other laws imposed waiting periods before the offer could commence. *See, e.g.*, ARK. STAT. ANN. § 67-1264.2(5); GA. CODE ANN. § 22-1902(e); HAWAII REV. STAT. § 417E-3(f); IDAHO CODE § 30-1503(1); KAN. STAT. ANN. § 17-1277(a); LA. REV. STAT. ANN. § 51:1501(E); MICH. COMP. LAWS ANN. § 451.905(2); N.Y. BUS. CORP. LAW § 1605; S.D. COMP. LAWS ANN. §§ 47-32-21, -22; VA. CODE § 13.1-531(a).

<sup>9</sup>*See Galanti, Business Associations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 31, 65-66 (1982).

<sup>10</sup>U.S. CONST. art. I, § 8, cl. 3.

between the state laws and the federal act and on the purported authority of state laws to regulate securities transactions outside of their boundaries.

The first test case to reach the United States Supreme Court was disposed of on procedural grounds,<sup>11</sup> and the question of the constitutionality of state takeover statutes was not raised before the Court for another three years. In the summer of 1982, the Supreme Court made its first analysis of the constitutionality of a state tender offer statute in *Edgar v. MITE Corp.*<sup>12</sup> The Illinois Business Take-Over Act<sup>13</sup> was challenged because it empowered the secretary of state to block a nationwide tender offer for control of a company with Illinois ties, if the bidding company failed to comply with its requirements. The Court found that the Illinois Act placed an undue burden on interstate commerce and, thus, was unconstitutional.<sup>14</sup>

The invalidation of the Illinois Act raised questions about the constitutionality of the other state tender offer statutes, including Indiana's Takeover Offers Act,<sup>15</sup> on which the Illinois law appeared to have been modeled.<sup>16</sup> Although Indiana's Act was modified in 1981 to meet constitutional concerns raised in connection with the Illinois law,<sup>17</sup> the Indiana Act still contains provisions that are troublesome under the commerce clause. Specifically, the Indiana Act allows the state securities commissioner to prevent the consummation of a tender offer for shares in a company with strong Indiana ties.<sup>18</sup> The Act gives state regulators the power to sidetrack a tender offer for as many as twenty business days.<sup>19</sup> In addition, to the extent that the Act allows the tender offer to be delayed, giving the target company time

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<sup>11</sup>*Great Western United Corp. v. Kidwell*, 439 F. Supp. 420 (N.D. Tex. 1977), *aff'd*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979). *Great Western*, delayed in its attempt to make a tender offer by the enforcement of the Idaho business takeover law, filed suit seeking a declaration that the Idaho statute was unconstitutional as applied to interstate tender offers to purchase securities traded on a national exchange. *See* 439 F. Supp. at 421.

<sup>12</sup>102 S. Ct. 2629 (1982).

<sup>13</sup>Pub. L. No. 80-1421 (1978) (codified at ILL. REV. STAT. ch. 121½, §§ 137.51 to .70 (Supp. 1980)).

<sup>14</sup>102 S. Ct. 2629 (1982).

<sup>15</sup>IND. CODE §§ 23-2-3.1-0.5 to -11 (1982).

<sup>16</sup>Indiana's business takeover law was first enacted in April 1975, and took effect on May 1, 1975. Act of May 1, 1975, Pub. L. No. 263, 1975 Ind. Acts 1469, 1469 (1975). Illinois' statute was adopted in September 1978. The fact that the Illinois statute contained similar language to provisions of the 1975 Indiana Act raises the inference that the Indiana law was used as a model.

<sup>17</sup>*See infra* notes 67-74 and accompanying text. The amendments to the Indiana Act were in response to the Seventh Circuit's holding in *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980).

<sup>18</sup>IND. CODE § 23-2-3.1-1(j) (1982).

<sup>19</sup>*Id.* §§ 23-2-3.1-7, -8.

to mount a defense, the statute will interfere with interstate commerce by depriving shareholders who live outside Indiana of a lucrative market for their stock in the target company.

The Indiana Act, as amended in 1981, has not yet been tested in the courts. This Note examines the Indiana Takeover Offers Act in light of the Supreme Court's analysis in *MITE* of the Illinois Act. This Note also will measure the Indiana Act against the Williams Act. This Note will argue for federal preemption of state takeover laws and will recommend changes to be made by the Indiana legislature.

## II. *Edgar v. MITE Corp.*

The focus of the Supreme Court's first substantive analysis of the constitutionality of state takeover laws was *Edgar v. MITE Corp.*,<sup>20</sup> which challenged the Illinois Business Take-Over Act<sup>21</sup> on commerce clause and supremacy clause grounds.<sup>22</sup> In that case, MITE made a

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<sup>20</sup>102 S. Ct. 2629 (1982).

<sup>21</sup>ILL. REV. STAT. ch. 121½, §§ 137.51 to .70 (Supp. 1980).

<sup>22</sup>The Illinois Act differed from the Williams Act in several significant respects. First, the Illinois Act gave shareholders 17 calendar days from the date of the original offer to withdraw their shares, ILL. REV. STAT. ch. 121½, § 137.59(C), compared with seven days under the Williams Act and 15 business days under a subsequent SEC regulation. See *supra* note 2. However, like the Williams Act, the Illinois Act permitted shareholders to withdraw their shares any time after 60 days from the time the tender offer was first made. ILL. REV. STAT. ch. 121½, § 137.59(C). Second, the Illinois Act specified that a tender offer would not become effective until 20 business days after it was filed with the secretary of state. *Id.* § 137.54(E). Under the Williams Act, a tender offer is effective when it is first published or sent to shareholders. 15 U.S.C. § 78n(d)(1) (1977). Third, the Illinois Act permits the secretary of state to hold hearings on a tender offer. ILL. REV. STAT. ch. 121½, § 137.57. The secretary of state could initiate a hearing if he considered it necessary for protection of the Illinois shareholders of the target company. *Id.* § 137.57(A). In addition, the Illinois Act required the secretary of state to hold a hearing if one was requested by a majority of the outside directors of the target company, who are neither officers nor employees of the target company, or by Illinois residents who owned at least 10% of the stock in the class that was subject to the tender offer. *Id.* The law required the hearing to start within 10 days after the date the request for the hearing was received. *Id.* § 137.57(C). The secretary of state could extend the date of the hearing for the convenience of the parties or for the protection of the target company's Illinois shareholders. *Id.* There apparently was no deadline by which the hearing must begin in cases where the secretary of state ordered a hearing without receiving a request for one.

Under the Illinois Act, the secretary of state was required to rule on the tender offer within 15 business days of the conclusion of the hearing, unless the interests of Illinois shareholders warranted an extension. *Id.* § 137.57(D). However, there was no statutory limitation on the length of those hearings.

The secretary of state was empowered to deny registration of the tender offer if, among other things, he found that it was inequitable. *Id.* § 137.57(E). Until the offer was registered, the tender offeror could not contact shareholders of the target company. *Id.* § 137.54(A).

cash tender offer for all outstanding shares of Chicago Rivet and Machine Company, an Illinois corporation, by filing with the Securities Exchange Commission (SEC) the information required by the Williams Act. MITE made no effort to comply with the Illinois law. Instead, MITE filed suit in the United States District Court for the Northern District of Illinois seeking a declaratory judgment that the Illinois Business Take-Over Act was preempted by the Williams Act and violated the commerce clause of the United States Constitution.<sup>23</sup> MITE also requested a temporary restraining order and preliminary and permanent injunctions to prevent the Illinois secretary of state from enforcing the state statute.<sup>24</sup> After a series of legal maneuvers by Chicago Rivet and the Illinois secretary of state, the district court issued an order barring the secretary of state from enforcing the Illinois Act against MITE. Three days later, MITE published its tender offer in the February 5th issue of the Wall Street Journal. The same day, Chicago Rivet issued an offer for forty percent of its own shares. The district court, in its final judgment, permanently enjoined enforcement of the Illinois Act on the grounds that it conflicted with the Williams Act and violated the commerce clause. The court of appeals affirmed the district court's findings.<sup>25</sup>

The Supreme Court, in a decision which produced six separate opinions,<sup>26</sup> went on to hold that the Illinois Act was unconstitutional under the commerce clause.<sup>27</sup> The Court concluded that the Illinois

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<sup>23</sup>Edgar v. MITE Corp., 102 S. Ct. 2629, 2634 (1982) (the district court opinion is unreported).

<sup>24</sup>*Id.*

<sup>25</sup>MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980). The Seventh Circuit specifically found that the case was not moot because of the Illinois secretary of state's stated intention to enforce the Illinois law against MITE. *Id.* at 490. The Illinois secretary of state had raised the mootness question because, after the district court judgment was entered, MITE and Chicago Rivet entered into an agreement through which both tender offers were withdrawn and which allowed MITE to take steps preparatory to another tender offer for Chicago Rivet's shares. Ultimately, MITE announced it would not make a second tender offer. *Id.*

<sup>26</sup>The majority of the Court found that the case was not moot and that the Illinois Act violated the commerce clause. Justice White, joined by Chief Justice Burger, delivered the Court's opinion. Justice White, Chief Justice Burger, and Justices Blackmun, Stevens and O'Connor joined in the part of the opinion finding the case was not moot. Justice White, Chief Justice Burger and Justices Powell, Stevens and O'Connor joined in the part of the opinion finding that the Illinois Act violated the commerce clause.

Justices Stevens and O'Connor each wrote separate concurring opinions in which they found that the case was not moot. Justice Powell wrote a concurring opinion in which he found that the Illinois Act violated the commerce clause. Justice Marshall filed a dissenting opinion in which Justice Brennan joined. Justice Rehnquist filed a separate dissenting opinion.

<sup>27</sup>102 S. Ct. at 2641-43.

law failed the test enunciated in *Pike v. Bruce Church, Inc.*<sup>28</sup> for determining whether a state statute unduly burdened interstate commerce.

The Supreme Court found that the extraterritorial effect of the Illinois Act could be characterized as "[t]he most obvious burden" imposed on interstate commerce.<sup>29</sup> The law's nationwide reach "purports to give Illinois the power to determine whether a tender offer may proceed anywhere."<sup>30</sup> The Court enumerated the substantial effects of allowing the Illinois secretary of state to block a nationwide tender offer. First, shareholders could lose their chance to sell their stock at a premium.<sup>31</sup> Second, the law could hinder the reallocation of economic resources to their highest-valued use.<sup>32</sup> Third, the Illinois Act could reduce the incentive that tender offers give target company management to perform well so that stock prices remain high.<sup>33</sup>

The Court rejected Illinois' claim that its business takeover law furthered legitimate local interests by protecting resident shareholders and by merely regulating the internal affairs of state-chartered corporations.<sup>34</sup>

The Court observed, with some irony, that the Illinois Act did not apply to Chicago Rivet's competing tender offer for its own shares. A company's purchase of its own shares was specifically exempted from the requirements of the Illinois Act.<sup>35</sup> The Court said that exemption "[left] Chicago Rivet's shareholders to depend only on the protections afforded them by federal securities law, protections which Illinois views as inadequate to protect investors in other contexts."<sup>36</sup>

The Court was not convinced that the Illinois Act enhanced the position of resident shareholders because the Williams Act offered the same substantive protections.<sup>37</sup> Even though the Illinois Act required more disclosure than the Williams Act, the Court found that the additional information "may not substantially enhance the shareholders' ability to make informed decisions."<sup>38</sup> The Court said

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<sup>28</sup>397 U.S. 137 (1970). That test requires a state law to be upheld if it "regulated even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

<sup>29</sup>102 S. Ct. at 2641-42.

<sup>30</sup>*Id.* at 2642.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* The Court stated that, "[w]hile protecting local investors is plainly a legitimate state objective, the state has no legitimate interest in protecting non-resident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." *Id.*

<sup>35</sup>ILL. REV. STAT. ch. 121½, § 137.52-9(4).

<sup>36</sup>102 S. Ct. at 2642.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* Compare ILL. REV. STAT. ch. 121½, § 137.54 with 15 U.S.C. § 78l(a)-(c).

that the additional delays embodied in the Illinois statute could outweigh any benefits of added disclosure by allowing target company management more time to initiate defensive maneuvers.<sup>39</sup>

### III. ANALYSIS OF *MITE*

The Supreme Court properly found that the Illinois Business Take-Over Act was void as an undue burden on interstate commerce.<sup>40</sup> No other conclusion could be justified in view of the impact on the national securities markets resulting from the law's ability to block nationwide tender offers.

Given that the Illinois Act was vulnerable on both commerce clause and supremacy clause grounds, it is inexplicable why the preemption analysis in the Court fell short of a majority. Certainly a law with one constitutional flaw is just as void as a law with several. As pinpointed and analyzed by Justice White's opinion, three basic aspects of the Illinois Act posed an obstacle to the accomplishment of the goals of the Williams Act. The Illinois provisions for a precommencement notification, for hearings, and for a regulatory veto by the secretary of state frustrated the "market approach" of the Williams Act by taking away from the shareholder the decision whether to accept a tender offer.<sup>41</sup> With the delays caused by the precommencement notification process and by the hearings, the Act increased the chances that the tender offer would fail or be defeated through the defensive actions of the target company.<sup>42</sup> By giving the

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<sup>39</sup>102 S. Ct. at 2642.

<sup>40</sup>*Id.* at 2643.

<sup>41</sup>*Id.* at 2637.

<sup>42</sup>*Id.*

As further evidence of the conflict between the state and the federal regulatory schemes, the Justices looked to the legislative history of the Williams Act. They found that Congress specifically rejected precommencement notification. Justice White's opinion quoted the Senate report on the Williams Act:

"At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence. In view of the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer, the bill as approved by the committee requires only that the statement be on file with the Securities and Exchange Commission at the time the tender offer is first made to the public."

*Id.* at 2638 (quoting S. REP. NO. 550, 90th Cong., 1st Sess. 1, 4 (1967)).

Using the same analysis, the Justices concluded that the hearings provision of the Illinois Act conflicted with the Williams Act by adding undue delay to the tender offer process. 102 S. Ct. at 2638. The Court found that "Congress anticipated investors and the takeover offeror be free to go forward without unreasonable delay. The potential for delay provided by the hearing provisions upset the balance struck by Congress by favoring management at the expense of stockholders." 102 S. Ct. at 2639.

secretary of state an opportunity to block the tender offer on grounds of unfairness, the law again deprived the shareholders of an opportunity to decide for themselves.<sup>43</sup>

Thus, Justice White, with Justices Burger and Blackmun, concluded that the Illinois statute also was void under the supremacy clause, and their analysis on this point is persuasive.<sup>44</sup> Of the justices who concurred with White and Burger in the commerce clause holding, only Justice O'Connor chose not to discuss supremacy "because it was not necessary to reach the preemption issue."<sup>45</sup>

Justice Powell, putting his own gloss on federal legislative history, concluded that "the Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure—at least in some circumstances—greater protection to interests that include but often are broader than those of incumbent management."<sup>46</sup> On that basis, he declined to rule that the Illinois statute was void under the supremacy clause. It is, indeed, an odd interpretation of the meaning of neutrality to conclude that it sanctions giving greater protection to one side over another.

Justice Stevens, taking an unorthodox view of the supremacy clause, declined to join in the preemption holding because he was not persuaded "that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management."<sup>47</sup>

Given the obvious conflicts between the Illinois Act and the Williams Act, the Court should have nullified the Illinois Act on supremacy clause grounds as well as on the commerce clause grounds. However, the Court did not flatly declare that there could be no state regulation of interstate tender offers.<sup>48</sup> At first blush, the Court's reluctance to void the Illinois Act on preemption grounds may appear to be disingenuous. The Court held out the possibility that states could legislate in this area but gave no hints how they may do so within the confines of the commerce clause. The answer might be found in the test of *Pike v. Bruce Church, Inc.*, cited by the Court,<sup>49</sup> which requires a state law to be upheld if "its effects on interstate commerce

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<sup>43</sup>102 S. Ct. at 2639. The Justices commented: "[t]he Court of Appeals understood the Williams Act and its legislative history to indicate that Congress intended for investors to be free to make their own decisions. We agree." *Id.*

<sup>44</sup>*Id.* at 2635-37. *See supra* notes 40-43.

<sup>45</sup>102 S. Ct. at 2643. *See supra* note 26.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.* at 2648.

<sup>48</sup>*Id.* at 2642-43.

<sup>49</sup>*Id.* at 2641.

are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."<sup>50</sup>

#### IV. THE INDIANA TAKEOVER OFFERS ACT

##### A. *An Historical Look*

Against this backdrop stands the Indiana Takeover Offers Act.<sup>51</sup> The Indiana General Assembly first addressed the issue of state regulation of tender offers in a statute enacted in 1975.<sup>52</sup> That law was repealed and another enacted in 1979.<sup>53</sup> The 1979 law applied to offers to acquire stock in a target company if, after the purchase, the offeror would be the owner of more than ten percent of any class of stock,<sup>54</sup> a higher threshold than that provided in the Williams Act. The law did not apply unless the target company was an Indiana corporation with its principal place of business and substantial assets in the state.<sup>55</sup> In addition, the law did not apply to Indiana target companies which had less than fifty shareholders.<sup>56</sup> For companies subject to federal securities laws, the disclosure requirements of the Indiana Act were identical to the Williams Act.<sup>57</sup> In fact, these companies had only to file a copy of each document that was required by the SEC to comply with the Indiana Act.<sup>58</sup> Companies not subject to federal laws were required to disclose information in the same broad categories required by the Williams Act, but in more detailed form.<sup>59</sup>

Many of the provisions of the 1979 Takeover Offers Act were similar to those in the Illinois Act. In particular, the Indiana statute

<sup>50</sup>397 U.S. 137, 142 (1970).

<sup>51</sup>IND. CODE §§ 23-2-3.1-0.5 to -11 (1982).

<sup>52</sup>Act of Apr. 29, 1975, Pub. L. No. 263, 1975 IND. ACTS 1469 (repealed 1979).

Indiana maintains no formal legislative histories on bills passed by the legislature, but an article written shortly after the 1975 statute became law sheds light on the legislators' intent in enacting the statute. The writers of the article observed that the statute passed without any dissenting votes in either house. The authors commented:

This support undoubtedly reflected the concern of many legislators that, with the current depressed stock prices and the availability of substantial capital in foreign money-markets, many Indiana-based businesses were fair prey to the corporate raider. The recent takeovers of two Indiana corporations were commonly cited as examples by supporters of the need for the legislation.

Leagre & Frick, *The New Indiana Business Take-Over Act: A New Weapon in the Arsenal to Fight the Unwanted Acquisition*, 19 RES GESTAE 154, 154 (1975).

<sup>53</sup>Act of Apr. 6, 1979, Pub. L. No. 235, 1979 IND. ACTS 1122 (codified at IND. CODE §§ 23-2-3.1-0.5 to -5, -7 to -11 (1982)).

<sup>54</sup>IND. CODE § 23-2-3.1-1(i) (1982).

<sup>55</sup>*Id.* § 23-2-3.1-1(j).

<sup>56</sup>*Id.* § 23-2-3.1-1(j)(5) (Supp. 1980). This provision has since been amended to raise the threshold to 75 shareholders. *Id.* § 23-2-3.1-8.6(a)(3) (1982).

<sup>57</sup>*Id.* § 23-2-3.1-5 (1982).

<sup>58</sup>*Id.*

<sup>59</sup>*Id.* § 23-2-3.1-5.

required tender offerors to file with the securities commissioner and with the target company a disclosure statement fifteen business days prior to the commencement of the offer.<sup>60</sup> The precommencement notification period required by the Illinois statute was twenty business days.<sup>61</sup> The 1979 version of the Indiana law mandated in all cases that hearings be held within fifteen business days of the filing of the registration statement.<sup>62</sup> In any case, the decision of the securities commissioner had to be made within that same fifteen-business-day period from the date of filing.<sup>63</sup> Indiana, like Illinois, permitted the regulatory officer to block the offer if he found it unfair.<sup>64</sup> Besides the precommencement notification period, the Indiana statute imposed yet another delay. The 1979 Act prevented the offeror from purchasing any shares within the first fifteen business days from the date the offer was made to the shareholders of the target company.<sup>65</sup>

### B. The 1981 Amendments

After the Seventh Circuit found the Illinois Act to be unconstitutional in *MITE*,<sup>66</sup> the Indiana General Assembly acted in an attempt to cure the common defects of the Indiana Act.<sup>67</sup> One of the features of the 1981 amendments was a statement outlining the legislature's reasons for enacting a business takeover law.<sup>68</sup> Heeding the court of appeals' decision in *MITE*, the Indiana legislature repealed the precommencement notification provision.<sup>69</sup> However, the legislature did not repeal the post-offer waiting period for the purchase of tendered shares. Instead, the legislature extended the prohibition on the pur-

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<sup>60</sup>*Id.* § 23-2-3.1-6 (Supp. 1980) (repealed 1981).

<sup>61</sup>ILL. REV. STAT. ch. 121½, § 137.54(E) (1979).

<sup>62</sup>IND. CODE § 23-2-3.1-7 (Supp. 1980), *amended by* Act of Apr. 24, 1981, Pub. L. No. 215, 1981 IND. ACTS 1700.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*; ILL. REV. STAT. ch. 121½, § 137.62(A) (Supp. 1980).

<sup>65</sup>IND. CODE § 23-2-3.1-8.

<sup>66</sup>*MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980).

<sup>67</sup>Act of Apr. 24, 1981, Pub. L. No. 215, 1981 IND. ACTS 1700 (codified at IND. CODE §§ 23-2-3.1-0.5 to -5, -7 to -11 (1982)).

<sup>68</sup>IND. CODE § 23-2-3.1-0.5 (1982). In this new section, the legislature found that it is often difficult for shareholders to get enough pertinent information to evaluate tender offers. The legislature stated:

By enacting this chapter, it is the intent and purpose of the general assembly to provide for full and fair disclosure of all material information concerning takeover offers to shareholders of Indiana corporations, so that the opportunity of each shareholder to make an informed and well-reasoned investment decision may be secured. It is the purpose of the general assembly to provide for adequate disclosure in a manner consistent with the Constitutions of the United States and of Indiana.

*Id.*

<sup>69</sup>Pub. L. No. 215 § 11, 1981 IND. ACTS 1700.

chase of shares to twenty business days after the offer is first made.<sup>70</sup>

The 1981 amendments maintained the mandatory hearing provision and extended the period in which the hearing must be held from fifteen business days to twenty business days from the date the disclosure statement was filed.<sup>71</sup> In light of the Seventh Circuit's objection to the substitution of a regulatory official's decision for that of a supposedly informed investor, the legislature stripped the securities commissioner of his power to block "unfair" tender offers.<sup>72</sup> Instead, the securities commissioner may prohibit the purchase of tendered shares only if he finds, by a preponderance of the evidence, that the registration statement fails to fully disclose all material information about the offer or that the offer is not made on substantially the same terms to all shareholders in the target company.<sup>73</sup>

The 1981 amendments broadened the antifraud provision of the Indiana Act. As a result, incumbent management of the target company, as well as the tender offeror, can be held liable for any untrue statement or omission of a material fact or for any fraudulent, deceptive, or manipulative acts or practices committed in connection with a tender offer.<sup>74</sup>

### C. *The Indiana Act and MITE*

The Supreme Court found the Illinois Act to be unconstitutional because of its power to block a tender offer outside of its own boundaries.<sup>75</sup> The same criticism can be made of the current Indiana Act. It is true that with the amendments, the Indiana Act cannot block a tender offer from being made to shareholders. It can, however, prevent the tender offer from being consummated by allowing the securities commissioner to prohibit the offeror from purchasing the tendered shares.<sup>76</sup>

The Indiana law is more narrowly drawn than the Illinois statute in that it applies only to target companies chartered in Indiana with their principal place of business and substantial assets in Indiana.<sup>77</sup> The Illinois statute applied to companies in which ten percent of the stock that was subject to the tender offer was owned by Illinois residents<sup>78</sup> or which met two of the following conditions: had its prin-

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<sup>70</sup>IND. CODE § 23-2-3.1-8 (1982).

<sup>71</sup>*Id.* § 23-2-3.1-7(a).

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>*Id.* § 23-2-3.1-8.5.

<sup>75</sup>*Edgar v. MITE Corp.*, 102 S. Ct. at 2641-42.

<sup>76</sup>IND. CODE § 23-2-3.1-8; *see supra* text accompanying note 73.

<sup>77</sup>IND. CODE § 23-2-3.1-1(j).

<sup>78</sup>ILL. REV. STAT. ch. 121½, § 137.52-10.

principal executive office in Illinois; was organized under Illinois law; or had at least ten percent of its stated capital and paid-in surplus represented in Illinois.<sup>79</sup>

Even with the 1981 amendments, the Indiana Act still would affect persons who live outside the state but who own stock in corporations that are organized in Indiana with their principal place of business and substantial assets here. To the extent that the law permits the Indiana securities commissioner to forbid the purchase of shares tendered by any shareholder—those living within Indiana as well as those from other states—it imposes an impermissible burden on interstate commerce under the Supreme Court's analysis in *MITE*.<sup>80</sup> It was the Illinois statute's "nationwide reach which purport[ed] to give Illinois the power to determine whether a tender offer may proceed anywhere"<sup>81</sup> that the Supreme Court characterized as "[t]he most obvious burden the Illinois Act impose[d] on interstate commerce."<sup>82</sup>

Besides the possibility of an outright prohibition, the Indiana law, without exception, will delay the purchase of tendered shares for twenty business days; that is, four weeks from the date the offer is made. During this period, the securities commissioner must hold hearings to determine the adequacy of the offeror's disclosures.<sup>83</sup> That this mandatory prepurchase waiting period is an advantage for incumbent management is unmistakable. During these twenty business days, the target company is free to buy up its own stock and to induce shareholders to withdraw any shares they might have already tendered to the offeror. The target company can engage in these defensive maneuvers without triggering any of the disclosure requirements imposed on the offeror.

In its amicus curiae brief in *MITE*, the SEC outlined other defensive maneuvers which can be taken by the target company while a tender offer is delayed. They include: announcement of dividend increases and stock splits; issuance of additional shares of stock; acquisition of other companies, resulting in an antitrust violation if the tender offer is successful; arrangement of a defensive merger; entering into restrictive loan agreements; and commencement of litigation to block the tender offer.<sup>84</sup> Other tactics include abolishing cumulative

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<sup>79</sup>*Id.*

<sup>80</sup>See *Edgar v. MITE Corp.*, 102 S. Ct. at 2641-42.

<sup>81</sup>*Id.* at 2642.

<sup>82</sup>*Id.* at 2641.

<sup>83</sup>See *supra* note 71 and accompanying text.

<sup>84</sup>Brief for the Securities and Exchange Commission as amicus curiae at 10 n.8, *Edgar v. MITE Corp.*, 102 S. Ct. at 2639 n.13. These defensive maneuvers may be very successful. With dividend increases and stock splits, incumbent management can drive up the market price of the target's stock, making the tender offer a more expensive proposition for the offeror. By issuing additional shares of stock, the target

voting and negotiating expensive lifetime contracts for incumbent management.<sup>85</sup> Congressman Peter Rodino of New Jersey warned that "the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful."<sup>86</sup> Rodino concluded that if a tender offer is defeated by delay, the shareholders "will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer."<sup>87</sup>

The Indiana Act's hearing provision and prepurchase waiting period make extended delay, with all the attendant pitfalls for the offeror, inescapable. There are some who argue that regulatory delays of this sort serve the beneficial purpose of investor protection. One writer opined that "delays created by prepurchase waiting periods or the hearings are needed for timely administrative review and effective use of administrative remedies. . . . [T]heir purpose is consistent with that of the [Williams] Act; any adverse effect they may have on the offeror is an acceptable cost of effecting that purpose."<sup>88</sup> Implicit in such an argument is the premise that the market approach, deliberately chosen by the drafters of the Williams Act, is not sufficient protection for investors. However, the market approach is based on the philosophy that any investor, whether sophisticated or neophyte, is better suited than a government regulator in managing his own financial affairs. Given the information required to be disclosed by the Williams Act, an investor can decide whether it is in his financial best interests to sell out. It is the investor who knows his financial

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company effectively forces the offeror to buy more shares in order to obtain the required margin for control. For example, if a target company had 10 million shares outstanding and if ownership of 10 percent, or one million shares, would give an investor working control, the issuance of two million additional shares of stock would force the tender offeror to purchase another 200,000 shares to obtain 10 percent ownership. By entering into restrictive loan agreements which provide that the loans could be called in, in the event of a change in control of the target company, the target can make itself financially unattractive to the bidder. With litigation challenging the tender offer based on alleged violations of state takeover laws, the target company can force the bidder into a potentially protracted and expensive lawsuit to defend the tender offer and, in the process, wear the bidder down.

<sup>85</sup>122 CONG. REC. 30,877 (1976) (debate on premerger notification and waiting period). By abolishing cumulative voting—a practice which gives shareholders who own less than 50 percent of the stock the mathematical possibility of electing one or more directors—the target company can make it difficult for the bidder, assuming the tender offer is successful, to have a voice on the board of directors. Faced with expensive lifetime contracts for incumbent management, the successful tender offeror may find it financially impractical to throw them out.

<sup>86</sup>122 CONG. REC. at 30,877.

<sup>87</sup>*Id.*

<sup>88</sup>Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 OHIO ST. L.J. 689, 717 (1981).

goals in owning the stock, such as long-term investment or short-term speculation, and who will evaluate the tender offer according to those goals. The Williams Act gives the investor the tools to make those decisions.

It has also been suggested that if delay permits defensive maneuvering by the target company which defeats the tender offer, a disappointed shareholder who loses an opportunity to tender his stock for a premium price has a remedy by suing incumbent management for breach of fiduciary duty.<sup>89</sup> Yet realistically speaking, only a rare shareholder would choose the uncertain rewards of a stockholder derivative suit over an opportunity to profit from the sale of his stock to a ready and willing offeror. Other suggested benefits of delay are a higher price for the stock from a "white knight"<sup>90</sup> brought in by the target company to compete with the tender offeror, and the unconventional financial reorganizations by incumbent management.<sup>91</sup> But these benefits are by no means guaranteed. The prospects of extended delay in completing the tender offer could discourage some offerors from initiating one in the first place. In addition, target companies may forego attempts to drive up the cost of the tender offer by declaring dividends or stock splits, which would benefit the shareholder, and instead initiate a lawsuit to block the tender offer. The attendant delays and expense for the offeror raise the possibility that the tender offer will not be completed. Thus, the shareholder loses a potentially lucrative market for his stock.<sup>92</sup>

The delays imposed by the Indiana Act could be greeted with the same skepticism that the Supreme Court in *MITE* reserved for the delays caused by the Illinois Act when it said that "the possible benefits of the potential delays required by the Act may be outweighed by the increased risk that the tender offer might fail due to defensive tactics employed by incumbent management."<sup>93</sup>

One of the goals of the Williams Act is to maintain a regulatory policy of neutrality toward tender offerors and the target company.<sup>94</sup> To the extent that a state law favors one side, it upsets that balance. Another aspect of the hearing provision of the Indiana Act has that effect. Under this section, all expenses related to the hearings, including the cost of transcripts, must be paid by the offeror.<sup>95</sup> The hear-

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<sup>89</sup>*Id.* at 718-19.

<sup>90</sup>The terms "white knight" and "angel" often are used to describe a friendly company sought out by a target company to take over the target company saving it from the "dragon," the tender offeror.

<sup>91</sup>Sargent, *supra* note 88, at 718-19.

<sup>92</sup>See *supra* notes 84 and 85.

<sup>93</sup>102 S. Ct. at 2642.

<sup>94</sup>See *supra* note 6.

<sup>95</sup>IND. CODE § 23-2-3.1-7(c) (1982).

ing provision also allows any person whose interests may be affected, including but not limited to any offeree and any representatives of the target company or of the offeror, to present evidence, to call witnesses and to offer oral arguments.<sup>96</sup> There is no limit on how many witnesses may be called. Conceivably, the target company could enlist any number of people whose interests would be affected by the tender offer, and call them as witnesses or join them as parties to the hearing. The potential for abuse and the added expense it will impose on the offeror is apparent. The law permits imaginative target companies to run up the expense of the hearing, already expensive to the offeror in terms of delay, and the offeror is powerless to protest the cost.

## V. A CASE FOR PREEMPTION

In *MITE*, the Supreme Court did not find that the Illinois Act was unconstitutional under the supremacy clause by virtue of having been preempted by the Williams Act, although three Justices advanced that view.<sup>97</sup> Even those Justices conceded that Congress had not prohibited the states from regulating tender offers and that the question whether a particular state law conflicted with the Williams Act would have to be resolved on a case-by-case basis.<sup>98</sup>

However, a strong argument can be made for preemption of state regulation of tender offers.<sup>99</sup> The Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee of the American Bar Association's Section on Corporation, Banking and Business Law concluded that "federal preemption is indicated because there is a particular need for uniformity in the area of tender offer legislation and because state laws are too pro-management."<sup>100</sup> The subcommittee's principal criticism of state takeover laws was that they were "designed and applied to protect incumbent management by forestalling takeovers. This protectionist tilt is inconsistent with the purposes of the Williams Act . . . ."<sup>101</sup> The subcommittee also found that the state takeover laws contained provisions which delay the progress of tender offers, a factor that favors the target company. In addition, the subcommittee observed that "the jurisdictional base announced in some of the statutes is broad, extending not only to target

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<sup>96</sup>*Id.* § 23-2-3.1-7(d).

<sup>97</sup>102 S. Ct. at 2635-37. Justices White, Burger and Blackmun found that three provisions of the Illinois Act "upset the careful balance struck by Congress" in the Williams Act's regulation of tender offers and thus ran afoul of the Supremacy Clause. 102 S. Ct. at 2637. *See supra* note 26.

<sup>98</sup>102 S. Ct. at 2635.

<sup>99</sup>*See* E. ARANOW, H. EINHORN & G. BERLSTEIN, *DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL* 225-29 (1977).

<sup>100</sup>*State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 193 (1976).

<sup>101</sup>*Id.* at 188.

companies incorporated in the state but also to those whose principal place of business is there."<sup>102</sup>

Because the Supreme Court has not found that state takeover laws are preempted by the Williams Act, Congress should do so. It may be that the Supreme Court's commerce clause objections in *MITE* to the Illinois Act will cause the remaining state takeover laws to fall one by one. But such an invalidation is not automatic. Inevitably, some state securities regulators will be unwilling to heed the judicial analysis of other states' laws that dooms their statutes as well.<sup>103</sup>

Rather than wait for case-by-case reversals of state takeover statutes, Congress should act to preempt this area of the law and, thus, provide a uniform approach to regulate nationwide tender offers. Presently, the multiplicity of state takeover laws can create anomalous situations for those offerors who are bidding for shares in a target company which is covered by the regulatory scheme of more than one state.<sup>104</sup> If Congress wished to leave the states some authority over tender offers, it could permit the states to create private causes of action for parties who allege they have been the victims of Williams Act violations. These remedies would supplement those available under the Williams Act.

#### IV. THE INDIANA ALTERNATIVE

There is little doubt that the Supreme Court's objections to the Illinois Business Take-Over Act also will prove fatal to the Indiana Act, largely because of the common flaws in the two statutes. But it remains to be seen whether all state regulation of tender offers will offend the commerce clause. In fact, Justice Powell, in his concurring opinion in *MITE*, explained that he joined in the section of the Court's opinion which nullified Illinois' law "because its Commerce Clause reasoning leaves some room for state regulation of tender offers."<sup>105</sup>

The Indiana legislature would be wise to repeal the mandatory hearings and prepurchase waiting period provisions of the business takeover law as they apply to corporations subject to federal securities laws. Once that is done, the legislature should consider expanding the antifraud provision contained in the present law and consider providing an express private right of action for shareholders as well as

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<sup>102</sup>*Id.* at 188-89.

<sup>103</sup>When the Supreme Court's decision in *MITE* was announced, Stephen Coons (then Indiana Securities Commissioner) was of the belief that the Indiana Act was safe. *Indianapolis Star*, June 25, 1982, at 29, col. 2.

<sup>104</sup>See Note, *The Validity of State Tender Offer Statutes: SEC Rule 14d-2(b) and Post-Kidwell Federal Decisions*, 38 WASH. & LEE L. REV. 1025 (1981).

<sup>105</sup>102 S. Ct. at 2643.

disappointed tender offerors. This would enable both groups to sue incumbent management for misleading statements or fraud in connection with a failed tender offer. Currently, the Indiana Act only makes such conduct "unlawful"<sup>106</sup> and does not specify whether there is a private right to sue or whether the remedy rests only with the securities commissioner in his prosecutorial capacity.

In view of *MITE*, a private right of action should withstand the constitutional challenges that brought down the Illinois Act. The state-level private civil remedies for rescission of the stock transaction or for damages for proven violations of the Williams Act would not impede the progress of a nationwide tender offer. Rather than operate prospectively to prevent a tender offer from proceeding, the private remedies would give target companies, their shareholders, and even disappointed offerors a means to pursue their own claims without interfering with the interests of shareholders in other states who may wish to take advantage of the tender offer. The focus of the Supreme Court's commerce clause objection to the Illinois law was that the statute purportedly gave the Illinois secretary of state the power to freeze a tender offer, not only in Illinois but also in the other forty-nine states.<sup>107</sup> The effect on interstate commerce is apparent. By contrast, a private cause of action would not have the injunctive effects of present state regulations. The bidding company would be free to make the tender offer and face any private civil consequences later. The same rationale applies to the option of giving a state regulatory agency the power to bring actions for civil penalties for violations of the Williams Act. So long as the administrative remedies do not affect the opportunities of shareholders in other states to evaluate the tender offer, they would come within the permissible area of regulation circumscribed by *MITE*.

The private remedies and retrospective administrative sanctions could also survive a challenge on supremacy clause grounds. Although the Supreme Court has previously ruled that the Williams Act provides no private right of action for disappointed tender offerors,<sup>108</sup>

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<sup>106</sup>See IND. CODE § 23-2-3.1-8.5 (1982).

<sup>107</sup>See *MITE*, 102 S. Ct. 2629.

<sup>108</sup>*Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977). Chris-Craft attempted to obtain control of Piper Aircraft Corporation by means of a tender offer. Chris-Craft's takeover attempt failed, and Bangor Punta Corporation, with the approval of the Piper family, obtained control of Piper. Chris-Craft filed suit under Section 14(e) of the Securities Exchange Act of 1934 and SEC Rule 10b-6. Chris-Craft alleged that Bangor Punta obtained control of Piper as a result of securities law violations by the Piper family, Bangor Punta and Bangor Punta's underwriter, First Boston Corp. The Supreme Court, with two justices dissenting, concluded that there was no private right of action under the Williams Act for a disappointed offeror who wishes to sue a successful bidder or the target company. *Id.* at 42. The Court also found that Chris-Craft did not have standing to assert the 10b-6 claim. *Id.* at 45.

the Williams Act itself does not forbid private causes of action; rather, the act is silent as to this remedy. Allowing private remedies would not frustrate the purpose of the Williams Act—investor protection—but rather would enhance that goal.<sup>109</sup> The remedies would be supplemental, not contradictory. Similarly, the Williams Act does not forbid all state regulatory activity. The only state regulation that would be forbidden by federal law is that which conflicts with the Williams Act or with other federal securities laws and regulations. State sanctions that promote the goals of the Williams Act and that do not favor either the target company or the offeror would be legitimate, even under a supremacy clause analysis.<sup>110</sup>

As it presently exists, there is little justification for Indiana's business takeover law, short of erecting impermissible barriers around home-state corporations. It gives no further protection to Indiana investors than that offered by the Williams Act because its only disclosure requirement is that the offeror file a copy of any statement required under federal law. The Indiana Act does not even speak to withdrawal or proration rights.<sup>111</sup> Therefore, the Williams Act provides the only protection afforded Indiana shareholders. While offering Indiana shareholders nothing more, the Indiana Act has the potential of actually harming the financial interests of resident shareholders, not to mention the fortunes of those who live outside the state, by delaying the tender offer until the opportunity to sell their stock at a premium is lost.

The analysis of the United States District Court for the District

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<sup>109</sup>See *supra* note 6 and accompanying text.

<sup>110</sup>See *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029 (1st Cir. 1982). In *Connolly*, the First Circuit Court of Appeals, in one of the first cases decided after *MITE*, upheld a state sanction in the face of a supremacy clause challenge. *Connolly* dealt with a Massachusetts statute which prohibited 10% shareholders from making a tender offer in Massachusetts for one year if the offeror failed to comply with state disclosure provisions. In remanding the case for consideration of commerce clause issues, the First Circuit reviewed the supremacy clause objections to the sanction provision and concluded that the penalty was not necessarily preempted by the Williams Act. *Id.* at 1038.

The court stated:

It is true that the one-year delay may often be a more serious penalty than is necessary to protect investors from the consequences of improper disclosure in a particular situation. To that extent it may be said to conflict with federal policy. On the other hand, the deterrent effect of the sanction is obviously beneficial to investors and is therefore in keeping with federal goals. Indeed, it may be that the deterrent effect is so powerful that violations can be expected only very rarely further reducing the degree of conflict.

*Id.* at 1039.

<sup>111</sup>The Indiana Act does not include provisions that would allow shareholders to withdraw or redeem their tendered shares. For the withdrawal and proration provisions of the Williams Act, see *supra* note 2.

of New Jersey in invalidating the New Jersey business takeover law<sup>112</sup> is particularly appropriate to Indiana. In commenting on the added burdens of the New Jersey law, the court observed:

Even as to New Jersey residents, the statute's benefits are uncertain at best. New Jersey residents are already protected by the disclosure and antifraud provisions of the Williams Act. Thus any additional benefit bestowed by the New Jersey statutes is at most marginal. Moreover, the delay caused by the statute can actually harm New Jersey residents by giving incumbent management of the target an opportunity to frustrate the tender offer entirely.<sup>113</sup>

It is clear that a state's interest in protecting the local business climate is not sufficient to justify the burdens a state takeover law imposes on interstate commerce.<sup>114</sup> Given the narrow strictures within which it can act, the Indiana legislature would serve its constituents well by abandoning the pretext of protecting Indiana residents through the hearings and prepurchase waiting periods in the Indiana Act and instead bow to the federal scheme for protecting investors' interests. In addition to avoiding the constitutional problems inherent in state tender offer legislation, the legislature could save shrinking fiscal resources by deferring to the Williams Act, supplemented by expanded state antifraud provisions. The money spent on hearing officers, investigators, clerks and the myriad technical and support services that go into Indiana's tender offer regulation could be better used elsewhere.

## VII. CONCLUSION

The Supreme Court's objections to the Illinois Business Take-Over Act also apply to Indiana's Takeover Offers Act and thus it is invalid under the commerce clause. Although some state regulation of tender offers may be constitutionally possible, the confines of such a law are not spelled out in *MITE*. Indiana shareholders would be better served if the legislature deferred to the federal government in the regulation of nationwide tender offers while adding supplemental state remedies. There are persuasive arguments for federal preemption of this area. Since the Supreme Court in *MITE* fell short of the necessary

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<sup>112</sup>N.J. STAT. ANN. §§ 49.5-1 to -19 (West Supp. 1982-1983).

<sup>113</sup>*Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1224 (D.N.J. 1981).

<sup>114</sup>The district court in *Great Western* concluded that the ultimate goal of the Idaho business takeover law was to "thwart tender offers and thereby prevent possible removal of the target company or its management, the closing of plants and related effects on the state's economy. But a state may not legitimate its regulation of interstate commerce by asserting this type of interest." 439 F. Supp. at 438.

majority to rule that Illinois' law (and by analogy, any similar state takeover law) was preempted by the Williams Act, Congress should preempt the regulation of interstate tender offers. Only then will there be a uniform national approach to govern this increasingly popular method of corporate takeovers.

JAN CARROLL



## Trial Rules 59 and 60(B)—Clearing the Murky Waters of Postjudgment Relief?

In a recent opinion, *Siebert Oxidermo, Inc. v. Shields*,<sup>1</sup> the Indiana Supreme Court resolved a conflict among the various districts of the Indiana Court of Appeals. Previously, litigants seeking to set aside a default judgment or an involuntary dismissal with prejudice had been victims of the courts of appeals' collective uncertainty concerning the proper procedure for obtaining this type of postjudgment relief under the Indiana Rules of Trial Procedure (Trial Rules).<sup>2</sup> The appellate courts disagreed as to whether a Trial Rule 59 motion to correct errors or a Trial Rule 60(B) motion for relief from judgment was initially required when this relief was sought within sixty days of judgment. The source of the uncertainty was the confusing time overlap for filing motions under Trial Rules 59 and 60(B): both motions are available within sixty days of judgment.<sup>3</sup> Trial Rule 59, which requires a motion to correct errors as a prerequisite to appeal in Indiana, was a major cause of the problem.

### I. *Oxidermo*—RESOLUTION OF THE CONFLICT

In *Siebert Oxidermo, Inc. v. Shields*,<sup>4</sup> Shields sued Oxidermo, and a default judgment was entered on May 24, 1979, after Oxidermo failed to answer Shields' complaint. Oxidermo filed a motion to set aside the default judgment in accordance with Trial Rules 55(C) and 60(B) on June 28, 1979, claiming its failure to appear was caused by excusable neglect. A hearing was held on Oxidermo's motion on September 6, 1979. The motion to set aside the default judgment was denied by the trial court on October 9, 1979, and the findings of fact and the conclusions of law were entered. Subsequently, Oxidermo filed a confusing series of postjudgment motions: two more motions to set aside the default judgment as well as three Trial Rule 59 motions to correct errors. A praecipe for the record was filed in the trial court on February 21, 1980. The trial court denied all six of Oxidermo's post-

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<sup>1</sup>No. 1282 S 471, slip op. (Ind. 1983).

<sup>2</sup>See, e.g., *Houston v. Wireman*, 439 N.E.2d 732 (Ind. Ct. App. 1982); *Mathis v. Morehouse*, 433 N.E.2d 814 (Ind. Ct. App. 1982); *Dawson v. St. Vincent Hosp. & Health Care Center, Inc.*, 426 N.E.2d 1328 (Ind. Ct. App. 1981). See *infra* notes 13-76 and accompanying text.

<sup>3</sup>Trial Rule 59 requires that a motion to correct errors be made within sixty days of judgment. A Trial Rule 60(B) motion must be made within a reasonable time, not to exceed one year. Thus, during the sixty days immediately following the judgment both motions are available.

<sup>4</sup>No. 1282 S 471, slip op. (Ind. 1983).

judgment motions. Finally, on May 14, 1980, the trial record was filed with the court of appeals to initiate Oxidermo's appeal.<sup>5</sup>

The Indiana Court of Appeals initially issued a memorandum decision affirming the actions of the trial court. However, a subsequent decision on rehearing remanded the case for a retrial solely on the issue of damages. Both parties then petitioned the Indiana Supreme Court for transfer. Shields' petition, which alleged, inter alia, jurisdictional problems resulting from the postjudgment relief procedures, was granted by the supreme court. In its initial decision of *Oxidermo*, the supreme court held that Oxidermo had forfeited its right to appeal because Oxidermo had failed to file a praecipe within thirty days of the denial of the first Trial Rule 59 motion to correct errors.<sup>6</sup> That decision was withdrawn after Oxidermo pointed out in a petition for rehearing that a praecipe was filed on February 21, 1980, within thirty days of the denial of the first Trial Rule 59 motion to correct errors. In the supreme court's subsequent decision, the court determined that it did have appellate jurisdiction over the case, but that the issue of excessive damages was not appealable by Oxidermo because it had failed to raise the issue in its first motion to set aside the default judgment.<sup>7</sup> As a result the Indiana Supreme Court, adopting the original decision of the court of appeals, affirmed the trial court's decision and award of damages.<sup>8</sup>

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<sup>5</sup>Oxidermo's motions following denial of the first Trial Rule 60(B) motion were as follows:

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| November 15, 1979 | — Second "Motion to Set Aside Default and Default Judgment," filed by Oxidermo.   |
| December 4, 1979  | — First "Motion to Correct Errors," responding to denial of first motion to set aside, filed by Oxidermo.                   |
| January 23, 1980  | — Second motion to set aside (filed November 15, 1979) denied.  |
| February 1, 1980  | — Second "Motion to Correct Errors," responding to denial of second motion to set aside, filed by Oxidermo.                 |
| February 13, 1980 | — Third "Motion to Set Aside Default and Default Judgment," filed by Oxidermo.  |
| February 14, 1980 | — First and second motions to correct error (filed December 4, 1979, and February 1, 1979) denied.                          |
| February 21, 1980 | — Praecipe for record filed in trial court by Oxidermo.   |
| March 28, 1980    | — Third motion to set aside (filed February 13, 1980) denied.   |
| May 13, 1980      | — Third "Motion to Correct Errors," responding to denial of third motion to set aside, filed by Oxidermo. Denied this date. |
| May 14, 1980      | — Record filed with Clerk of Supreme Court and Court of Appeals.  |

*Id.* at 3-4.

<sup>6</sup>*Id.* at 2. The initial decision was issued on December 7, 1982.

<sup>7</sup>No. 1282 S 471, slip op. (Ind. 1983). The subsequent decision was issued on March 16, 1983.

<sup>8</sup>*Id.* at 19.

The supreme court's ultimate decision in *Oxidermo* was not as significant as the court's resolution of the confusion surrounding the proper procedure for setting aside default judgments and involuntary dismissals. The source of this confusion, the overlap of Trial Rules 59 and 60(B), was illustrated by one of Shields' jurisdictional arguments. Relying upon a third district court of appeals decision, Shields argued that Oxidermo's first Trial Rule 60(B) motion to set aside the default judgment should have been treated as a Trial Rule 59 motion to correct errors, because it was filed within sixty days of the default judgment.<sup>9</sup> If a Trial Rule 60(B) motion is treated as a Trial Rule 59 motion, then denial of that Trial Rule 60(B) motion would trigger the thirty day filing requirement for a praecipe. Thus, according to Shields' argument, the praecipe would need to be filed within thirty days of the denial of that motion, making Oxidermo's praecipe untimely.

The supreme court rejected Shields' argument and, specifically overruling five appellate court cases,<sup>10</sup> resolved the dispute regarding the use of Trial Rules 59 and 60(B) in obtaining postjudgment relief from default judgments and involuntary dismissals. The supreme court determined that under no circumstances should a Trial Rule 60(B) motion be treated as a Trial Rule 59 motion to correct errors.<sup>11</sup> The court stated that the proper procedure for setting aside a default judgment is

to first file a Rule 60(B) motion to have the default or default judgment set aside. Upon ruling on that motion by the trial court the aggrieved party may then file a Rule 59 Motion to Correct Error alleging error in the trial court's ruling on the previously filed Rule 60(B) motion. Appeal may then be taken from the court's ruling on the Motion to Correct Error.<sup>12</sup>

*Oxidermo* set forth the procedure that must be followed to gain postjudgment relief from a default judgment or involuntary dismissal.

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<sup>9</sup>No. 1282 S 471, slip op. at 5 (citing *In re Marriage of Robbins*, 171 Ind. App. 509, 358 N.E.2d 153 (1976)).

<sup>10</sup>No 1282 S 471, slip op. at 9 (overruling *Pre-finished Moulding & Door, Inc. v. Insurance Guidance Corp.*, 438 N.E.2d 16 (Ind. Ct. App. 1982); *Mathis v. Morehouse*, 433 N.E.2d 814 (Ind. Ct. App. 1982); *Sowers v. Sowers*, 428 N.E.2d 245 (Ind. Ct. App. 1981); *Dawson v. St. Vincent Hosp. & Health Care Center, Inc.*, 426 N.E.2d 1328 (Ind. Ct. App. 1981); *In re Marriage of Robbins*, 171 Ind. App. 509, 358 N.E.2d 153 (1976)). Although not specifically overruled by the supreme court, other cases which are impliedly overruled by the supreme court's statement in *Oxidermo* that "[a]ny other cases following the overruled cases cited above are also hereby overruled," No. 1282 S 471, slip op. at 9, include *Houston v. Wireman*, 439 N.E.2d 732 (Ind. Ct. App. 1982); *Protective Ins. Co. v. Steuber*, 175 Ind. App. 139, 370 N.E.2d 406 (1977); *Kelly v. Bank of Reynolds*, 171 Ind. App. 515, 358 N.E.2d 146 (1976).

<sup>11</sup>No. 1282 S 471, slip op. at 9.

<sup>12</sup>*Id.* at 9-10.

The significance of this can be more readily understood through a discussion of the Indiana Trial Rules governing procedures for obtaining postjudgment relief and a discussion of the interpretations given these rules by the various districts of the court of appeals. An understanding of the overlap conflict and the role played therein by Trial Rule 59 highlights the inherent problems caused by requiring a Trial Rule 59 motion to be filed in all cases to establish appellate jurisdiction in Indiana.

## II. THE OVERLAP CONFLICT IN THE COURT OF APPEALS

Generally, postjudgment relief is sought in the trial court via a motion to correct errors under Trial Rule 59. Only after this motion has been made and ruled upon may an aggrieved litigant seek relief in the appellate courts.<sup>13</sup> However, the Indiana Trial Rules indicate two exceptions to this general practice, which were the center of the controversy resolved in *Oxidermo*.

Indiana Trial Rules 55(C) and 41(F), respectively, provide that default judgments and involuntary dismissals with prejudice may be set aside "for the grounds and in accordance with the provisions of Rule 60(B)."<sup>14</sup> Thus, these two rules indicate that postjudgment relief following a default judgment or an involuntary dismissal with prejudice should be sought initially by means of a Trial Rule 60(B) motion. When a Trial Rule 60(B) motion is denied, the party must file a Trial Rule 59 motion to correct errors in the trial court to establish appellate court jurisdiction over his appeal.<sup>15</sup>

A Trial Rule 60(B) motion for relief from judgment must be made within a reasonable time, not exceeding one year after the judgment is entered.<sup>16</sup> A Trial Rule 59 motion to correct errors, which is a prerequisite to an appeal in Indiana, must be made no later than sixty days after judgment.<sup>17</sup> Thus, during the sixty days after a default judgment or an involuntary dismissal with prejudice, Trial Rules 59 and 60(B) overlap, and litigants must decide which motion to make, a Trial

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<sup>13</sup>IND. R. TR. P. 59. See *infra* note 84 and accompanying text.

<sup>14</sup>IND. R. TR. P. 55(C), 41(F).

<sup>15</sup>See IND. R. TR. P. 60(C). See also IND. R. APP. P. 2(A), 4(A), 7.2(A).

<sup>16</sup>IND. R. TR. P. 60(B) provides in part: "The motion shall be filed within a reasonable time. . . and not more than one year after the judgment, order or proceeding was entered or taken . . . ."

<sup>17</sup>IND. R. TR. P. 59(C) provides:

(C) Time for filing: Service on judge. A motion to correct error shall be filed not later than sixty [60] days after the entry of a final judgment or an appealable final order. A copy of the motion to correct error shall be served, when filed, upon the judge before whom the case is pending pursuant to Trial Rule 5.

Rule 59 motion to correct errors or a Trial Rule 60(B) motion for relief from judgment.

Although Trial Rules 55(C) and 41(F) indicate that a default judgment or involuntary dismissal should be set aside "in accordance with the provisions of Trial Rule 60(B)," <sup>18</sup> some courts allowed or required a Trial Rule 59 motion to correct errors to be used initially to set aside the default judgment or involuntary dismissal with prejudice in certain situations. <sup>19</sup> Because Trial Rule 59(A)(9) permits a motion to correct errors "[f]or any reason allowed by these rules, statute or other law," <sup>20</sup> these courts determined that a Trial Rule 59 motion could be made based upon the same grounds for relief proscribed in Trial Rule 60(B), because Trial Rule 60(B) is part of "these rules." Thus, these courts determined that a party could make a Trial Rule 59 motion to correct errors that was "in accordance with the provisions of Rule 60(B)." <sup>21</sup> However, because the various districts of the court of appeals did not agree whether a Trial Rule 59 motion to correct errors could be used in these situations, and because those courts which did allow its use did not agree as to when it was proper, many appellants who relied on the decision of one district of the court of appeals were denied an appeal by a contradictory opinion rendered by another district. <sup>22</sup>

The various districts of the Indiana Court of Appeals generally took four different approaches in determining the proper roles of Trial Rules 59 and 60(B) following a default judgment or an involuntary dismissal with prejudice. One approach taken by the courts was based on a strict interpretation of Trial Rules 55(C) and 41(F). <sup>23</sup> This view

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<sup>18</sup>IND. R. TR. P. 41(F), 55(C).

<sup>19</sup>See, e.g., *Houston v. Wireman*, 439 N.E.2d 732 (Ind. Ct. App. 1982); *Mathis v. Morehouse*, 433 N.E.2d 814 (Ind. Ct. App. 1982); *Sowers v. Sowers*, 428 N.E.2d 245 (Ind. Ct. App. 1981); *Dawson v. St. Vincent Hosp. & Health Care Center, Inc.*, 426 N.E.2d 1328 (Ind. Ct. App. 1981); *In re Marriage of Robbins*, 171 Ind. App. 509, 358 N.E.2d 153 (1976).

<sup>20</sup>IND. R. TR. P. 59(A)(9).

<sup>21</sup>IND. R. TR. P. 41(F), 55(C). For a list of recent cases adopting this interpretation see *supra* note 19.

<sup>22</sup>See, e.g., *Houston v. Wireman*, 439 N.E.2d 732 (Ind. Ct. App. 1982); *Mathis v. Morehouse*, 433 N.E.2d 814 (Ind. Ct. App. 1982); *Dawson v. St. Vincent Hosp. & Health Care Center, Inc.*, 426 N.E.2d 1328 (Ind. Ct. App. 1981). In his dissent to one such ruling, *Houston v. Wireman*, Judge Sullivan stated:

[T]he permutations possible from the application or misapplication of Trial Rules 59 and 60 are virtually endless. It is another instance of the trap baited for the conscientious and careful practitioner who is not sufficiently clairvoyant to anticipate which particular appellate inconsistency will attach to his particular assertion of error.

439 N.E.2d at 734 (Sullivan, J., dissenting).

<sup>23</sup>See *Yerkes v. Washington Mfg. Co.*, 163 Ind. App. 692, 326 N.E.2d 629 (1975); *Hooker v. Terre Haute Gas Corp.*, 162 Ind. App. 43, 317 N.E.2d 878 (1974); *Northside*

did not recognize the overlap of Trial Rules 59 and 60(B); it required that relief initially be sought by means of a Trial Rule 60(B) motion. If the Trial Rule 60(B) motion was denied, then an aggrieved party seeking an appeal had to file a Trial Rule 59 motion to correct errors directed to the denial. This approach was adopted by the first district in both *Hooker v. Terre Haute Gas Corp.*<sup>24</sup> and *Yerkes v. Washington Manufacturing Co.*,<sup>25</sup> which were decisions giving the first interpretations of the rules following their adoption.

The second district adopted a "relief-sought" approach in *Kelly v. Bank of Reynolds*,<sup>26</sup> a 1976 case. The *Kelly* court explained that in most instances defaulted parties are seeking equitable relief from the trial court, because the party failed in some way to appear or to plead and now wants to offer facts that encourage the court to excuse that failure.<sup>27</sup> *Kelly*, however, was alleging an error of law, rather than the usual equitable reasons for relief from a default judgment.<sup>28</sup> Because this default was based on an error of law rather than a plea in equity, the *Kelly* court held that "when a judgment (default or otherwise) has been entered against a party, and that party alleges that an error of law forms a basis of that judgment, the allegations may be presented via a T.R. 59 motion to correct errors."<sup>29</sup> In a 1981 case, *Dawson v. St. Vincent Hospital & Health Care Center*,<sup>30</sup> the fourth district also adopted the relief-sought approach.

In *Protective Insurance Co. v. Steuber*,<sup>31</sup> a 1977 case, the first district modified its earlier opinion in *Yerkes* that relief from a default judgment could be sought only in accordance with the provisions of Trial Rule 60(B). The court determined that an exception to its rule in *Yerkes* should be allowed when a Trial Rule 59 motion to correct errors, directed to *errors of law* in the trial court, is filed within sixty days of judgment.<sup>32</sup> Thus, the first district, in effect, adopted the relief-sought standard first used in *Kelly*.<sup>33</sup>

The third district adopted a "timing" approach in *In re Marriage of Robbins*,<sup>34</sup> a 1976 case handed down the same day as *Kelly*. The

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*Cab Co. v. Penman*, 156 Ind. App. 577, 197 N.E.2d 838 (1973). See also *Pre-finished Moulding & Door, Inc. v. Insurance Guidance Corp.*, 438 N.E.2d 16, 21 (Ind. Ct. App. 1982) (Staton, J., concurring).

<sup>24</sup>162 Ind. App. 43, 317 N.E.2d 878 (1974).

<sup>25</sup>163 Ind. App. 692, 326 N.E.2d 629 (1975).

<sup>26</sup>171 Ind. App. 515, 358 N.E.2d 146 (1976).

<sup>27</sup>*Id.* at 519, 358 N.E.2d at 149.

<sup>28</sup>*Id.* at 521, 358 N.E.2d at 150.

<sup>29</sup>*Id.* at 522, 358 N.E.2d at 150.

<sup>30</sup>426 N.E.2d 1328 (Ind. Ct. App. 1981).

<sup>31</sup>175 Ind. App. 139, 370 N.E.2d 406 (1977).

<sup>32</sup>*Id.* at 143, 370 N.E.2d at 408-09.

<sup>33</sup>See *supra* notes 26-29 and accompanying text.

<sup>34</sup>171 Ind. App. 509, 358 N.E.2d 153 (1976). The Indiana Courts of Appeals,

court stated that "one of the common, overlapping purposes [of Trial Rules 59 and 60(B)] is to call errors, *either in equity or in law*, to the attention of the trial court to avoid an injustice."<sup>35</sup> The only difference the court suggested between the use of the two rules was the timing of the two motions.<sup>36</sup> Thus, the *Robbins* court held that a Trial Rule 59 motion could be used to seek relief from judgment within sixty days thereof.<sup>37</sup> Additionally, any motion that was based on grounds included in Trial Rule 60(B) that was made within sixty days of judgment would be treated as a Trial Rule 59 motion with no further motion to correct errors required prior to appeal.<sup>38</sup> Of course, the court in *Robbins* also stated that due to the sixty-day time limit for filing motions to correct errors, any Trial Rule 60(B) motion filed later than sixty days after judgment must be treated as a Trial Rule 60(B) motion and could be appealed only by filing a subsequent motion to correct errors.<sup>39</sup>

In 1981, only one month after *Dawson v. St. Vincent Hospital & Health Care Center*<sup>40</sup> was handed down by the fourth district, the third district again followed the timing approach of *Robbins* in *Sowers v. Sowers*.<sup>41</sup> The court in *Sowers* treated a Trial Rule 60(B) motion as a Trial Rule 59 motion to correct errors because it was filed within sixty days of judgment. As a result, the party was able to appeal without filing an additional motion to correct errors.<sup>42</sup>

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throughout this conflict, and the Indiana Supreme Court, in *Oxidermo*, cited *Robbins* as an appeal from a default judgment. In *Robbins*, however, Judge Staton specifically stated:

Although Edley Robbins refers to the judgment rendered in this action as a default judgment, it is not a default judgment. An answer was filed by Edley Robbins to his wife's petition for dissolution of their marriage. Both Edley Robbins and his wife had notice of the trial date for a trial on the merits. When a trial court proceeds to hear a divorce action on the merits even though one of the parties is absent, the resulting judgment is on the merits. The judgment is not a default judgment. Indiana Rules of Procedure, Trial Rule 55(B), would not be applicable. *Aetna Securities Company v. Sickels* (1949), 120 Ind. App. 300, 88 N.E.2d 789.

171 Ind. App. at 510, n.1, 358 N.E.2d at 154 n.1. Because *Robbins* was based on a judgment on the merits and was not an appeal from a default judgment, the appellate court was correct in allowing the appellant to seek relief by means of a Trial Rule 59 motion to correct errors. It appears that the court in *Robbins* allowed use of a Trial Rule 59 motion to allege Trial Rule 60 grounds for relief merely to avoid the requirement, at that time, of multiple motions to correct errors. See *supra* notes 101-08 and accompanying text.

<sup>35</sup>171 Ind. App. at 512, 358 N.E.2d at 155 (emphasis added).

<sup>36</sup>*Id.* at 513, 358 N.E.2d at 155.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at 513, 358 N.E.2d at 156.

<sup>40</sup>426 N.E.2d 1328 (Ind. Ct. App. 1981).

<sup>41</sup>428 N.E.2d 245 (Ind. Ct. App. 1981).

<sup>42</sup>*Id.* at 247.

In *Mathis v. Morehouse*,<sup>43</sup> decided in 1982, the second district followed and extended the timing test of *Robbins*, while specifically disapproving *Dawson's* relief-sought test.<sup>44</sup> The appellant in *Mathis* had made a Trial Rule 60(B) motion for relief from judgment. Upon its denial, the appellant made a Trial Rule 59 motion to correct errors that was also denied. Mathis then filed a praecipe within the required thirty days.<sup>45</sup> This was the proper procedure under the strict interpretation of the rules applied in the early cases.<sup>46</sup> It was also correct procedure under the relief-sought test of *Kelly* and *Dawson* because the appellant was seeking equitable relief and not correction of a legal error.<sup>47</sup> The *Mathis* court, however, held that Mathis had not properly preserved any errors for appeal.<sup>48</sup> The court ruled that any attack on a default judgment made within sixty days of that judgment shall be made by means of a Trial Rule 59 motion to correct errors.<sup>49</sup> The court treated Mathis' Trial Rule 60(B) motion as a Trial Rule 59 motion to correct errors because it was filed within sixty days of judgment. This interpretation resulted in the appellant's praecipe not being timely filed and the subsequent dismissal of his appeal.<sup>50</sup>

It is interesting to note that although the courts in *Kelly* and *Robbins* rejected the strict ruling of *Yerkes* in order to allow appeals to be heard on the merits, in *Dawson* and *Mathis*, the courts' extensions of the rulings in *Kelly* and *Robbins* operated to deny the appeals.

Compromise was attempted, later in 1982, in *Pre-finished Moulding & Door, Inc. v. Insurance Guidance Corp.*,<sup>51</sup> when the third district took a "liberal" approach to the problem. The court reviewed Trial Rules 41(F), 55(C), 59, and 60(B) and the long line of cases construing these rules.<sup>52</sup> Two of the most recent cases, *Dawson*<sup>53</sup> and *Mathis*,<sup>54</sup> were compared. The court explained that it could not agree with *Dawson's* relief-sought approach. It did not believe that a motion to correct errors was necessary following a Trial Rule 60(B) motion to alert the trial court or the appellate court to the errors to be raised

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<sup>43</sup>433 N.E.2d 814 (Ind. Ct. App. 1982).

<sup>44</sup>*Id.* at 816.

<sup>45</sup>*Id.* at 815.

<sup>46</sup>See *supra* notes 23-25 and accompanying text.

<sup>47</sup>See *supra* notes 26-30 and accompanying text.

<sup>48</sup>433 N.E.2d at 815.

<sup>49</sup>*Id.* at 815-16.

<sup>50</sup>*Id.* Indiana Appellate Rule 2(A) requires that the praecipe be filed within thirty days of the trial court's ruling on the motion to correct errors.

<sup>51</sup>438 N.E.2d 16 (Ind. Ct. App. 1982).

<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 18 (citing *Dawson v. St. Vincent Hosp. & Health Care Center, Inc.*, 426 N.E.2d 1328 (Ind. Ct. App. 1981)).

<sup>54</sup>438 N.E.2d at 18 (citing *Mathis v. Morehouse*, 433 N.E.2d 814 (Ind. Ct. App. 1982) (Sullivan, J., dissenting)).

on appeal.<sup>55</sup> Because denial of a Trial Rule 60(B) motion is generally reviewed only for abuse of discretion, this court determined that a motion to correct errors following a Trial Rule 60(B) motion did little to aid the reviewing court.<sup>56</sup>

The *Pre-finished Moulding* court indicated that the *Mathis* timing approach of allowing only a Trial Rule 59 motion to correct errors within sixty days of judgment would be preferable because it would be quick and inexpensive.<sup>57</sup> However, the court in *Pre-finished Moulding* expressed a strong belief that interests of justice and fair play required that both the *Dawson* and *Mathis* procedures be allowed "until such time as our Supreme Court establishes by rule or decision that no motion to correct errors will be permitted to be addressed to the ruling on a TR 60 motion."<sup>58</sup> This court refused to deny appellate review to a litigant who was forced to choose among three different judicial views of the postjudgment procedure. Instead, the court decided to take a more liberal approach and allow the use of either a Trial Rule 59 or 60(B) motion initially, until the Indiana Supreme Court determined what was proper.<sup>59</sup>

Judge Staton concurred in the result but disagreed with the majority's reasoning, stating that "the majority's reasoning needlessly complicates the procedural law when the wording of the Trial Rules is unmistakably clear."<sup>60</sup> He would have followed the strict interpretation of the early cases that required an initial Trial Rule 60(B) motion following a default judgment or involuntary dismissal.<sup>61</sup>

The majority in the second district, in September of 1982, refused to adopt this liberal compromise approach. In *Houston v. Wireman*,<sup>62</sup> the second district reaffirmed its ruling in *Mathis*; it held that within sixty days of judgment *only* a Trial Rule 59 motion to correct errors could be used to set aside a default judgment.<sup>63</sup> In a lengthy footnote, the majority discussed *Pre-finished Moulding's* liberal view allowing the use of a Trial Rule 59 motion, or a Trial Rule 60(B) motion followed by a Trial Rule 59 motion, until the supreme court specifies which is correct.<sup>64</sup> The second district responded that "[t]here is arguable merit to [the third district's] position. However, contrary to the major-

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<sup>55</sup>438 N.E.2d at 19.

<sup>56</sup>*Id.*

<sup>57</sup>*Id.* at 20.

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

<sup>60</sup>*Id.* at 21 (Staton, J., concurring).

<sup>61</sup>*Id.*

<sup>62</sup>439 N.E.2d 732 (Ind. Ct. App. 1982).

<sup>63</sup>*Id.* at 734. See *supra* notes 43-50 and accompanying text.

<sup>64</sup>439 N.E.2d at 733 n.2 (citing *Pre-finished Moulding & Door, Inc. v. Insurance Guidance Corp.*, 438 N.E.2d 16 (Ind. Ct. App. 1982)).

ity's conclusion, the Supreme Court has spoken."<sup>65</sup> The majority then explained that

to the extent T.R. 60(B) provides grounds for relief not explicitly enumerated as grounds for relief in T.R. 59(A), it has explicitly incorporated the grounds by the provisions of T.R. 59(A)(9). Thus, the reasonable time envisioned by T.R. 60(B) excludes any error which is discovered or is discoverable by due diligence within the time limitations of T.R. 59(C). Hence, the provisions of T.R. 41(F) and T.R. 55(C) . . . must be read in the context of the scheme presented by T.R. 59 and T.R. 60 so that relief may be appropriate under T.R. 60 only so far as the basis for relief was not discovered or . . . discoverable with due diligence within the limitations for a timely T.R. 59 motion.<sup>66</sup>

As in *Mathis*, Judge Sullivan again dissented from the majority opinion.<sup>67</sup> He stated that the "[a]ppellee properly preserved and presented the error by resort to Trial Rule 60,"<sup>68</sup> and suggested that the majority's opinion "indicates that the permutations possible from the application or misapplication of Trial Rules 59 and 60 are virtually endless."<sup>69</sup> Judge Sullivan also lamented that in recent years the courts had rendered many decisions concerning the interrelationship of Trial Rules 59 and 60(B), "few of which may be harmonized or reconciled; neither have the individual judges and justices been consistent or in agreement."<sup>70</sup> Presenting a long list of citations to cases involving Trial Rules 59 and 60, the Judge stated that "[i]f all the words written by our appellate courts concerning Trial Rule 59 vis a vis Trial Rule 60 were placed end to end, they would stretch to nowhere."<sup>71</sup>

After this review of the conflicting cases and views of the various districts and judges, it becomes apparent that the purposes for Trial Rules 59 and 60(B) in this area of postjudgment relief were not clear when *Oxidermo* arrived before the Indiana Supreme Court. The majority in the second district had stated that the rules were clear in requiring the use of a Trial Rule 59 motion, rather than a Trial Rule 60(B) motion, when a party seeks to set aside a default judgment or an involuntary dismissal within sixty days of judgment.<sup>72</sup>

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<sup>65</sup>439 N.E.2d at 733 n.2 (citing *Logal v. Cruse*, 267 Ind. 83, 86, 368 N.E.2d 235, 237 (1977)).

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 734 (Sullivan, J., dissenting).

<sup>68</sup>*Id.*

<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

<sup>72</sup>*E.g.*, *Houston v. Wireman*, 439 N.E.2d 732, 733 n.2 (Ind. Ct. App. 1982).

Judge Staton, of the third district, believed that the rules clearly required that a default judgment or an involuntary dismissal be set aside *only* by means of a Trial Rule 60(B) motion.<sup>73</sup> The fourth district believed that a Trial Rule 60(B) motion should be used, but the court would allow the use of a Trial Rule 59 motion when the motion was based on a legal error.<sup>74</sup> The majority in the third district believed that the timing approach taken by the second district was preferable, but due to the diversity of opinion among the judges on the courts of appeals and the resulting unfairness to litigants, the court awaited direction from the Indiana Supreme Court.<sup>75</sup> Judge Sullivan, of the second district, was also dismayed by this confusing line of cases that "stretch to nowhere."<sup>76</sup> Thus, as this brief overview clearly indicates, if the rules *were clear* there would not have been all these different interpretations.

In *Siebert Oxidermo, Inc. v. Shields*,<sup>77</sup> the supreme court agreed with the original strict interpretation established by the first district in *Yerkes v. Washington Manufacturing Co.*<sup>78</sup> The supreme court stated that the rule in *Yerkes* required the initial filing of a Trial Rule 60(B) motion to set aside the default judgment. Upon its denial, a Trial Rule 59 motion to correct errors may be made within sixty days of the court's ruling on the Trial Rule 60(B) motion, and an appeal could be taken from the court's denial of the motion to correct errors.<sup>79</sup> The supreme court also stated that under no circumstances should a Trial Rule 60(B) motion be treated as a Trial Rule 59 motion to correct errors.<sup>80</sup> The *Oxidermo* court accused the *Robbins* court and others that diverged from the holding in *Yerkes* of having "hopelessly obscured the already murky requirements for post judgment relief . . . ."<sup>81</sup>

The procedure chosen by the Indiana Supreme Court is most in accord with the wording of Trial Rules 55(C) and 41(F), which allow default judgments and involuntary dismissals to be set aside "for the grounds and in accordance with the provisions of Rule 60(B)."<sup>82</sup> The

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<sup>73</sup>Pre-finished Moulding & Door, Inc. v. Insurance Guidance Corp., 438 N.E.2d at 21 (Staton, J., dissenting).

<sup>74</sup>E.g., Dawson v. St. Vincent Hosp. & Health Care Center, Inc., 426 N.E.2d 1328 (Ind. Ct. App. 1981).

<sup>75</sup>Pre-finished Moulding & Door, Inc., 438 N.E.2d at 20.

<sup>76</sup>Houston v. Wireman, 439 N.E.2d at 734 (Sullivan, J., dissenting).

<sup>77</sup>No. 1282 S 471, slip op. (Ind. 1983).

<sup>78</sup>163 Ind. App. 692, 326 N.E.2d 629 (1975).

<sup>79</sup>No. 1282 S 471, slip op. at 8 (Ind. 1983).

<sup>80</sup>*Id.* at 9

<sup>81</sup>*Id.* (citing 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 76 (Supp. 1982)) (quoting Harvey, *Civil Procedure and Jurisdiction*, 1976 *Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 51, 71 (1977)).

<sup>82</sup>IND. R. TR. P. 55(C), 41(F).

required filing of a Trial Rule 59 motion to correct errors following a denial of the Trial Rule 60(B) motion is also in accordance with Trial Rule 60(C), which states that "[a] ruling or order of the court denying or granting relief, in whole or in part, by motion under subdivision (B) of this rule shall be deemed a final judgment, and an appeal may be taken therefrom as in the case of a judgment."<sup>83</sup> Furthermore, all other judgments may be appealed only after the requisite filing of a Trial Rule 59 motion to correct errors in the trial court.<sup>84</sup> Therefore, the court's ruling appears to be a logical interpretation of the Trial Rules governing default judgments and involuntary dismissals.

### III. PREREQUISITE TO APPEAL—INHERENT PROBLEM OF TRIAL RULE 59

Although the supreme court's ruling in *Oxidermo* on the overlap conflict certainly clarified the procedures for setting aside a default judgment in a manner that is consistent with the Trial Rules, the decision does not solve certain inherent problems involved with seeking postjudgment relief in Indiana. Since its adoption, Trial Rule 59 has been a source of great confusion and controversy for litigants, especially those whose appeals have not been heard on the merits as a result of a failure to comply with the technical requirements of Trial Rule 59.<sup>85</sup> Therefore, it is not surprising that Trial Rule 59 played a leading role in the recent dispute concerning the proper procedure for setting aside a default judgment or an involuntary dismissal with prejudice.

The problems created by Trial Rule 59 are even less surprising in light of the development of the Indiana Trial Rules governing postjudgment relief and, specifically, Trial Rule 59. Prior to the adoption of the Indiana Rules of Trial Procedure in 1969, a "great need for compilation and centralization"<sup>86</sup> of the statutory provisions for attack-

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<sup>83</sup>IND. R. TR. P. 60(C).

<sup>84</sup>An amendment to Trial Rule 59 subsequent to the supreme court decision in *P-M Gas & Wash Co. v. Smith*, 268 Ind. 297, 375 N.E.2d 592 (1978), eliminated language in the Trial Rule that specifically stated that a Trial Rule 59 motion to correct errors was a condition to appeal. For the text of Trial Rule 59(G) prior to the 1980 amendment, see *infra* note 104. However, Indiana Appellate Rules 2(A), 4(A), and 7.2(A) suggest that the motion to correct errors is still a prerequisite to appeal in Indiana. See also 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 14 (Supp. 1982) [hereinafter cited as HARVEY].

<sup>85</sup>See, e.g., *State v. Deprez*, 260 Ind. 413, 296 N.E.2d 120 (1973); *Snider v. Gaddis*, 413 N.E.2d 322 (Ind. Ct. App. 1980); *Ebersold v. Wise*, 412 N.E.2d 802 (Ind. Ct. App. 1980); *Diaz v. Duncan*, 406 N.E.2d 991 (Ind. Ct. App. 1980); *Davis v. McElhiney*, 396 N.E.2d 140 (Ind. Ct. App. 1979); *Stuteville v. Downing*, 391 N.E.2d 629 (Ind. Ct. App. 1979); *Trimble v. Trimble*, 167 Ind. App. 600, 339 N.E.2d 614 (1976).

<sup>86</sup>Note, *Procedural Techniques for Belated Attacks on Judgments in Indiana*, 32 IND. L.J. 205, 237 (1957).

ing judgments in Indiana existed. In 1957, one commentator complained that "present statutory remedies have sprung from different sources and have evolved independently; consequently, many areas overlap and others are not adequately provided for."<sup>87</sup> In 1969, the statutes were compiled and centralized. The new Indiana Trial Rules incorporated many of the Federal Rules of Civil Procedure, while maintaining some of the peculiarities of the old Indiana procedures.<sup>88</sup> However, before the new Indiana Trial Rules even became effective on January 1, 1970,<sup>89</sup> one scholar predicted that because the new Indiana Trial Rules contained "highly interrelated and overlapping provisions," they would "pose some challenging questions of construction and administration."<sup>90</sup>

As was predicted over a decade ago, the Indiana Trial Rules have posed many problems.<sup>91</sup> In a recent opinion, Judge Sullivan commented that "our rules constitute in many respects a morass and a mixture of overlap, insufficiency, inconsistency and incomprehensibility."<sup>92</sup> Judge Sullivan suggested that the root of the current problem was "the attempted adoption of many or most of the federal rules but thereafter engrafting onto those rules incompatible old Indiana procedures."<sup>93</sup>

Judge Sullivan's comment is particularly applicable to the relationship between Trial Rule 60 and Trial Rule 59. The major provisions of Trial Rule 60 are nearly identical to Federal Rule 60;<sup>94</sup> Trial Rule 59, however, has little resemblance to Federal Rule 59.<sup>95</sup> Trial Rule 59 is actually a modification of the old Indiana motion for a new trial and was not designed to mesh with Trial Rule 60 which was modeled after Federal Rule 60. The failure of these two trial rules to complement each other in providing postjudgment relief has created troublesome overlaps and conflicts that result from trying to combine trial rules that come from different sources. As illustrated in the *Oxidermo* decision, the most recent example of this overlap con-

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<sup>87</sup>*Id.*

<sup>88</sup>Greenebaum, *Post Trial Motions Under the New Indiana Rules*, 45 IND. L.J. 377, 377 (1970).

<sup>89</sup>Act of March 13, 1969, ch. 191, 1969 Ind. Acts 546-717 (codified at IND. CODE § 34-5-1-5 (1982)).

<sup>90</sup>Greenebaum, *supra* note 88, at 377.

<sup>91</sup>*See id.*

<sup>92</sup>*Mathis v. Morehouse*, 433 N.E.2d 814, 817 (Ind. Ct. App. 1982) (Sullivan, J., dissenting).

<sup>93</sup>*Id.*

<sup>94</sup>*Compare* IND. R. TR. P. 60 *with* FED. R. CIV. P. 60. *See also* Greenebaum, *supra* note 88, at 384.

<sup>95</sup>*Compare* IND. R. TR. P. 59 (the Indiana rules require a Trial Rule 59 motion to correct errors as a prerequisite to appeal) *with* FED. R. CIV. P. 59 (the Federal Rules contain no similar provision).

flict was the confusion surrounding the use of Trial Rules 59 and 60(B) in seeking postjudgment relief from a default judgment or an involuntary dismissal.<sup>96</sup>

More serious than the problems that arise from the overlap of Trial Rules 59 and 60(B) are the problems created by making Trial Rule 59 a prerequisite for appeal. When the Indiana Trial Rules were adopted in 1969, the Indiana Supreme Court determined that the motion to correct errors should remain a condition to appeal, although the Civil Code Study Commission reported eleven reasons why it should not be a prerequisite.<sup>97</sup> Requiring a party to file a Trial Rule

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<sup>96</sup>Siebert Oxidermo, Inc. v. Shields, No. 1282 S 471, slip op. (Ind. 1983). See *supra* notes 13-84 and accompanying text.

<sup>97</sup>HARVEY, *supra* note 84, at 119-20 (1971) (quoting Civil Code Study Commission Comments). These reasons were:

First: It will assure consideration of cases upon the merits, rather than solution on technical grounds which must be blamed only on the lawyer taking the appeal or the very uncertainty of the technical law involved.

Second: The motion to correct error seldom is effective below. It is common knowledge that not more than 2% or 3% of all cases are reversed when the motion is made. It, therefore, wastes everybody's time.

Third: The transcript of evidence seldom, if ever, is available to aid a party in determining whether or not prejudicial error was committed. Consequently, a lawyer cannot fairly present the issues for correction within the time provided, and out of caution he is forced to raise issues which may prove not to be reversible error.

Fourth: The expenses of reproducing the motion for a new trial, rather than emphasizing the actual events in the record where error was committed are costly, and time consuming.

Fifth: Past experience has shown a tendency upon the part of courts on appeal to develop technical language for assigning error on appeal especially when such error must go through a series of restatements in motions, briefs and arguments.

Sixth: In criminal cases, the technical limitation that all errors be raised within a relatively short period of time after the trial and before the transcript is prepared is almost unbelievable in this day when the rights of those accused of crimes are so well recognized.

Seventh: The real effect of requiring a motion for a new trial is to consume time and promote delay. The delay involved often is such that, if generally known, it would lead to more radical innovations. *Compare, e.g., Indianapolis Life Ins. Co. v. Lundquist*, 222 Ind. 359, 53 N.E.2d 338 (1944).

Eighth: If the trial judge is permitted to serve as a court of appeal, his decision on questions of law raised by the motion to correct error is made without the benefit of briefs which represent the final step in the appeal process. Briefs cannot be artfully drawn without the transcript and the record which usually are not available in the time and place where the motion is made below.

Ninth: Judges on appeal often admit that failure to raise error properly below is an effective means of allowing them to dispose of the cases. If the case is without merit, or if it is poorly presented, the proper remedy is by means of the court's power to deal with counsel, and in all cases with the merits.

Tenth: In view of the over-all ineffectiveness of the motion to correct

59 motion to correct errors prior to appeal has adversely affected thousands of appellants. Appellants are routinely denied a hearing on the merits of their appeal, because they failed to fully comply with the technical requirements of the motion to correct errors. This failure to comply may result from neglecting to include an alleged error in the motion to correct errors,<sup>98</sup> from filing the motion later than the prescribed sixty-day period after final judgment,<sup>99</sup> or from merely failing to use the technical language required by the appellate court.<sup>100</sup>

In addition to these general problems resulting from the prerequisite filing of a Trial Rule 59 motion, a major problem arose involving the requirement of multiple motions to correct errors. This was finally resolved in 1980, when Trial Rule 59 was subjected to a major revision<sup>101</sup> that brought it in line with the Indiana Supreme Court decision in *P-M Gas & Wash Co. v. Smith*.<sup>102</sup> In *P-M Gas*, the Indiana Supreme Court overruled a long line of cases<sup>103</sup> that had interpreted Trial Rule 59(G)<sup>104</sup> as requiring a new motion to correct errors each

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error (formerly motion for a new trial), it presents, in final analysis, a technical obstacle in the way of consideration of a case upon its merits. Parties who feel that relief can be obtained below are free to seek it. As a mandatory rule it presents an unreasonable cost to the time of professors, students and lawyers in getting to the merits on an appeal.

Eleventh: The old rule followed in Indiana has long since been rejected in the federal courts and other jurisdictions where effort has been made to eliminate delay and cost in judicial administration.

<sup>98</sup> See, e.g., *Cunningham v. Associates Capital Servs. Corp.*, 421 N.E.2d 681 (Ind. Ct. App. 1981); *Means v. Indiana Fin. Corp.*, 416 N.E.2d 896 (Ind. Ct. App. 1981); *Hieb v. Metropolitan Dev. Comm'n of Marion County*, 412 N.E.2d 321 (Ind. Ct. App. 1980).

<sup>99</sup> See, e.g., *Kelsey v. Nagy*, 410 N.E.2d 1333 (Ind. Ct. App. 1980); *Kratkoczki v. Regan*, 381 N.E.2d 1077 (Ind. Ct. App. 1978); *Lines v. Browning*, 156 Ind. App. 185, 295 N.E.2d 853 (1973).

<sup>100</sup> HARVEY, *supra* note 84, at 119 (1971).

<sup>101</sup> IND. CODE ANN., IND. R. TR. P. 59 Supreme Court Committee note (West 1981). See also Robertson, *Revised Trial Rule 59 and P-M Gas*, 13 IND. L. REV. 541 (1980).

<sup>102</sup> 268 Ind. 297, 375 N.E.2d 592 (1978) (holding that appellants need not file a motion to correct errors each time the judgment was altered prior to appeal).

<sup>103</sup> 268 Ind. at 301, 375 N.E.2d at 594 (overruling *State v. Deprez*, 260 Ind. 413, 296 N.E.2d 120 (1973); *Campbell v. Mattingly*, 168 Ind. App. 651, 344 N.E.2d 858 (1976); *Lake County Title Co. v. Root Enter.*, 167 Ind. App. 559, 339 N.E.2d 103 (1975); *Minnette v. Lloyd*, 166 Ind. App. 1, 333 N.E.2d 791 (1975); *Miller v. Mansfield*, 164 Ind. App. 583, 330 N.E.2d 113 (1975); *Hansbrough v. Indiana Revenue Bd.*, 164 Ind. App. 56, 326 N.E.2d 599 (1975); *Weber v. Penn-Harris-Madison School Corp.*, 162 Ind. App. 28, 317 N.E.2d 811 (1974); *Koziol v. Lake County Plan Comm'n*, 161 Ind. App. 232, 315 N.E.2d 374 (1974); *Easley v. Williams*, 161 Ind. App. 24, 314 N.E.2d 105 (1974); *State v. Kushner*, 160 Ind. App. 464, 312 N.E.2d 523 (1974); *Wyss v. Wyss*, 160 Ind. App. 281, 311 N.E.2d 621 (1974); *Davis v. Davis*, 159 Ind. App. 290, 306 N.E.2d 377 (1974)).

<sup>104</sup> Indiana Trial Rule 59(G), before it was amended in 1980, provided:

(G) Motion to correct error a condition to appeal. In all cases in which a motion to correct errors is the appropriate procedure preliminary to an appeal, such motion shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of filing such motion.

time the court changed its judgment in any manner.<sup>105</sup> In those cases, many appellants were unable to obtain a decision on the merits because they had failed to make multiple motions to correct errors.<sup>106</sup> The amended rule has been interpreted to require that at least one motion to correct errors be made in the trial court before an appeal can be taken,<sup>107</sup> and either party may appeal from the ruling on that initial motion to correct errors.<sup>108</sup>

One result of the *P-M Gas* amendment to Trial Rule 59 is that some errors can now be raised on appeal although they were not included in a motion to correct errors.<sup>109</sup> If errors in this limited area may be raised in the appellate brief without previously being included in a motion to correct errors, it would seem plausible that all errors could be raised in this manner. The supreme court refused to make such a dramatic move, however, and in *P-M Gas*, the court emphasized three purposes it believed were served by the motion to correct errors:

- (1) to present to the trial court an opportunity to correct error which occurs prior to the filing of the motion; (2) to develop those points which will be raised on appeal by counsel; and (3) to inform the opposing party concerning the points which will be raised on appeal so as to provide that party an opportunity to respond in the trial court and on appeal.<sup>110</sup>

Upon careful examination, it appears that all three purposes for the prerequisite filing of a Trial Rule 59 motion could be accomplished by other means. The first purpose appears negligible considering, as the Civil Code Study Commission reported, "not more than 2% or

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Issues which could be raised upon a motion to correct errors may be considered upon appeal only when included in the motion to correct errors filed with the trial court. A motion to correct errors shall not be required in the case of appeals from interlocutory orders, orders appointing or refusing to appoint a receiver, and from orders in proceedings supplemental to execution.

<sup>105</sup>268 Ind. at 302, 375 N.E.2d at 594.

<sup>106</sup>See *supra* note 103 and accompanying text. See also Grove, *The Requirement of a Second Motion to Correct Errors as a Prerequisite to Appeal*, 10 IND. L. REV. 462 (1977).

<sup>107</sup>HARVEY, *supra* note 84, at 14 (Supp. 1982).

<sup>108</sup>*Id.* See also Robertson, *supra* note 101.

<sup>109</sup>Robertson, *supra* note 101, at 561 n.125 (citing IND. CODE ANN., IND. R. TR. P. 59 Supreme Court Committee note (West 1981)). Judge Robertson noted that: This result will arise in situations where the appellant receives a judgment against the appellee at the trial court level and the appellee files a motion to correct errors. If the trial court grants the appellee's motion overturning the appellant's judgment, the appellant not only may challenge the unfavorable determination in favor of appellee's motion but also may raise errors that occurred during trial on brief without filing any motion to correct errors.

Robertson, *supra* note 101, at 561 n.125.

<sup>110</sup>268 Ind. at 301, 375 N.E.2d at 594 (1978).

3% of all cases are reversed when the motion is made."<sup>111</sup> Even if trial courts currently make numerous corrections of error as a result of Trial Rule 59 motions, they would not necessarily be precluded from doing so merely because the litigant was not required to make the motion to correct errors as a condition to appeal.<sup>112</sup> As for the second and third purposes, the points to be raised on appeal can be more carefully and fully developed in the briefs of the parties than in a motion to correct errors that must usually be filed without the benefit of an opportunity to look over the transcript of the evidence.<sup>113</sup> Because the trial record is not yet available, appellants are more likely to make broad allegations of error so that no error is missed and thereby waived.<sup>114</sup> Yet Trial Rule 59 requires that "[e]ach claimed error shall be stated in specific rather than general terms, and shall be accompanied by a statement of the facts and grounds upon which the errors are based."<sup>115</sup> These conflicting requirements force the appellant into a difficult position. He must be as general as possible to avoid waiving an error for appeal, without being so general that the court will not consider the motion due to a lack of specificity.

It appears that the purposes to be accomplished by the motion to correct errors could be accomplished just as well without the prerequisite filing of a motion to correct errors. As one commentator observed:

Parties in federal court, where the motion to correct errors is unknown, seem to have no special difficulty in apprising trial courts of the existence of trial error, and there is no evidence that the federal appellate courts cannot do their jobs without having issues on appeal formulated in a motion to correct errors.<sup>116</sup>

Thus, the prerequisite motion to correct errors has caused routine problems with waiver of issues on appeal as well as major conflicts such as the pre-*P-M Gas* requirement of multiple motions and the more recent overlap conflict. All these problems have arisen because the

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<sup>111</sup>HARVEY, *supra* note 84, at 119 (1971) (quoting Civil Code Study Commission Comments).

<sup>112</sup>Dean Grove suggested an optional motion to correct errors. Grove, *supra* note 106, at 477.

<sup>113</sup>HARVEY, *supra* note 84, at 119 (1971).

<sup>114</sup>Because the Trial Rule 59 motion to correct error is a prerequisite to appeal, any alleged error that is not included in that motion is considered waived for purposes of appeal. *See, e.g., Stanley v. Fisher*, 417 N.E.2d 932 (Ind. Ct. App. 1981); *Ebersold v. Wise*, 412 N.E.2d 802 (Ind. Ct. App. 1980); *Hockelberg v. Farm Bureau Ins. Co.*, 407 N.E.2d 1160 (Ind. Ct. App. 1980); *Ligon Specialized Hauler, Inc. v. Hott*, 384 N.E.2d 1071 (Ind. Ct. App. 1979); *Warren v. City of Indianapolis*, 375 N.E.2d 1163 (Ind. Ct. App. 1978).

<sup>115</sup>IND. R. TR. P. 59(D)(2).

<sup>116</sup>Grove, *supra* note 106, at 477-78.

motion to correct errors is a condition to appeal in Indiana. Yet, it appears that the prerequisite motion to correct errors adds little to appellate procedure that could not be accomplished just as well by an appellate brief or an optional motion to correct error.

Judge Robertson warned, however, that "the overtaxed intermediate appellate system" might not be able to handle the raising of errors by means of a brief rather than by means of a motion to correct errors.<sup>117</sup> Judge Robertson suggested that "the court may rely on other procedural devices to eliminate frivolous appeals that threaten to clog the [courts]."<sup>118</sup> Although the concern with frivolous appeals is understandable, the motion to correct errors should not be used by the appellate courts as a "technical obstacle in the way of consideration of a case upon its merits."<sup>119</sup> The Civil Code Study Commission suggested that "[i]f the case is without merit, or if it is poorly presented, the proper remedy is by means of the court's power to deal with counsel, and in all cases with the merits."<sup>120</sup>

Additionally, elimination of the motion to correct errors as a condition to appeal is not likely to add greatly to the number of cases that are appealed because the cost of appealing a decision is tremendous even without the additional cost of a motion to correct errors. The more likely result of eliminating the prerequisite motion would be to require the appellate courts to consider more cases on the merits, rather than on the fulfillment of the technical requirements of Trial Rule 59. Its elimination would, however, reduce the workload of Indiana trial courts, which would no longer need to respond to, and usually deny, endless motions to correct errors.

#### IV. CONCLUSION

If the Trial Rules are really as clear as the supreme court indicated, why did the appellate courts have such a difficult time interpreting and applying them? The supreme court itself gave part of the answer when it accused the appellate decisions of having "hopelessly obscured the *already murky* requirements for post judgment relief."<sup>121</sup>

The procedure for seeking postjudgment relief from a default judgment or an involuntary dismissal, as clarified in *Oxidermo*, requires

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<sup>117</sup>Robertson, *supra* note 101, at 562.

<sup>118</sup>*Id.*

<sup>119</sup>HARVEY, *supra* note 84, at 119 (1971) (quoting Civil Code Study Commission Comments).

<sup>120</sup>*Id.* (quoting Civil Code Study Commission Comments).

<sup>121</sup>No. 1282 S 471, slip op. at 8 (Ind. 1983) (citing HARVEY, *supra* note 84, at 76 (Supp. 1982)) (quoting Harvey, *Civil Procedure and Jurisdiction, 1976 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 51, 71 (1977)).

two motions prior to appeal, a Trial Rule 60(B) motion and a Trial Rule 59 motion to correct errors. The additional motion appears to add nothing to the litigation but extra expense and to extend the period required for resolution of the dispute. This two-motion approach, unless absolutely necessary, contradicts Trial Rule 1 which specifies that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action."<sup>122</sup>

The problems remaining after the *Oxidermo* ruling, both the inherent problems of obtaining postjudgment relief due to "murky" trial rules and the lack of the "just, speedy and inexpensive determination of every action,"<sup>123</sup> could be easily resolved if the Indiana Supreme Court would make one change in the Indiana Trial Rules—eliminate the motion to correct errors under Trial Rule 59 as a prerequisite to appeal. This approach not only would have prevented the problems in *P-M Gas* and *Oxidermo*, but also would prevent future problems from developing. As Judge Sullivan recently stated: "It is time now for our appellate tribunals to adopt or effect procedures which permit resolution of genuine legal issues on appeal. It must not be [the courts'] function to make that resolution unduly complicated, expensive, burdensome and time consuming."<sup>124</sup>

SHARON B. HEARN

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<sup>122</sup>IND. R. TR. P. 1.

<sup>123</sup>*Id.*

<sup>124</sup>*Houston v. Wireman*, 439 N.E.2d 732, 735 (Ind. Ct. App. 1982) (Sullivan J., dissenting).



## Remedy Without A Right: *Board of Education v. Pico*

### I. INTRODUCTION

Cases involving student challenges to school board decisions to remove books from school libraries have been confusing.<sup>1</sup> Opinions, exhibiting a general murkiness, have not defined what constitutional issues are involved and have failed to provide guidelines and standards for local school boards.<sup>2</sup> The courts seem to be torn between a personal dislike of content-based removal of books<sup>3</sup> and a reluctance to intervene in policies set by local elected officials.<sup>4</sup>

When the United States Supreme Court granted certiorari in *Board of Education v. Pico*<sup>5</sup> last year, followers of school library cases hoped that a decision might provide guidelines, definitions, and clarity. The Court announced its decision, however, with seven separate opinions<sup>6</sup> that generally reiterated the concerns that appeared in the earlier library cases but did not truly answer the questions:

—Which constitutional rights, if any, are at stake when school boards remove books from school libraries?

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<sup>1</sup>See *Pico v. Board of Educ.*, 102 S. Ct. 2799 (1982); *Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438 (2d Cir. 1980); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *Presidents Council v. Community School Bd. Number 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679 (D. Me. 1982); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

<sup>2</sup>See generally cases cited *supra* note 1.

<sup>3</sup>See *Pico v. Board of Educ.*, 638 F.2d 404, 416, 434, 438 (2d Cir. 1980) (Newman, J., concurring), *aff'd*, 102 S. Ct. 2799 (1982); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710, 714 (D. Mass. 1978).

<sup>4</sup>See *Pico v. Board of Educ.*, 638 F.2d 404, 419, 425 (2d Cir. 1980) (Mansfield, J., dissenting), *aff'd*, 102 S. Ct. 2799 (1982); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304-05 (7th Cir. 1980); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710 (D. Mass. 1978).

<sup>5</sup>474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd and remanded*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

<sup>6</sup>*Board of Educ. v. Pico*, 102 S. Ct. 2799 (1982) (plurality opinion). Even Justice Brennan, the author of the plurality opinion, was critical of the result in *Pico*. In a rare moment of public self-criticism, Justice Brennan said that the Supreme Court probably made a mistake in taking the case and that it was a "paradigm example" of the Court addressing a constitutional issue it could have avoided. He suggested that the case might have been better decided or avoided altogether had the case gone to trial pursuant to the Second Circuit's decision, before being taken up by the Supreme Court. Speech by Justice Brennan to judges of the United States Court of Appeals for the Third Circuit (Sept. 9, 1982) (reported by the Associated Press, available on NEXIS).

—Do students have a right to receive certain information in the schools? If so, under what circumstances?

—What are the roles of the public school and the school library? Are they marketplaces of ideas or inculcators of societal values?

—Is there a difference between removing books from a library and failing to acquire certain books?

Although the *Pico* decision reaffirmed that school boards have broad powers<sup>7</sup> tempered by narrow limitations,<sup>8</sup> it imposed few, if any, practical limits on school board actions and provided little direction for school boards or lower courts.<sup>9</sup>

Although the Supreme Court neither recognized a broad right of access to information for high school students<sup>10</sup> nor truly defined which right is involved in library cases, the opinions in *Pico* suggest the issue is tied to the free speech clause of the first amendment. A majority of the Court agreed that an improperly motivated school board can violate some right by removing books from school libraries, but no five members of the Court were able to agree on what right was violated.<sup>11</sup> In that respect the Court broke with the traditional method of analyzing constitutional issues, which is first to establish what right is at stake and then to determine if that right has been violated.

This Note will examine the *Pico* decision, the origins of the undefined right, and the reasons why the Supreme Court did not endorse the right proposed by the plurality, a limited right of access to information for high school students. This Note will also explore

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<sup>7</sup>102 S. Ct. at 2806 (citing *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 507 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510, 543 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

<sup>8</sup>102 S. Ct. at 2809-10 (citing *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>9</sup>The decision had a practical effect within the Island Trees Union Free School District where the case originated. Less than two months after the Supreme Court issued its opinion affirming the appellate court decision to remand the case for trial, the board of education voted to return to the school libraries the books they had removed. *TIME*, Aug. 23, 1982, at 47.

<sup>10</sup>See *infra* notes 93-158 and accompanying text.

<sup>11</sup>102 S. Ct. at 2810-12 (plurality opinion); *id.* at 2812-16 (Blackmun, J., concurring); *id.* at 2816-17 (White, J., concurring). *Pico* was the first time the Court openly endorsed a motivational standard in a case strictly tied to free speech. Other free speech cases have discussed motivation but have not openly turned on that issue. Adopting a motivation standard opens the courtroom door to a host of other difficult problems, including which motivations are permissible and which are not, how to handle cases of mixed motivation, and how to determine the actual motivation in a given case. This Note will not, however, explore the motivation issue.

why the Court in *Pico* provided a remedy to high school students without a corresponding right.

A. *Facts of Board of Education v. Pico*

School board members of the Island Trees Union Free School District received lists of books that groups in other communities considered anti-American, seditious, and filthy. The school board subsequently ordered nine books on the list removed from the high school libraries, one from the junior high school library,<sup>12</sup> and one from the senior high school curriculum.<sup>13</sup>

The school superintendent objected to the removal saying that official school board policy for handling controversial library materials was not being followed and that removing the books could create a community furor.<sup>14</sup> The school board insisted, however, that all copies of all the books be removed from the libraries. The predicted furor arose, and the school board named a committee of school employees and parents to review the books.

The committee voted to return six books to the high school library and to remove two; it took no action on one book and disagreed about two others. The school board ignored the committee, returning two books to the library and permanently removing the other nine from the shelves. After the lawsuit was filed, the school board pointed to profanities, sexual allusions and offensive language as reasons for removing the books.<sup>15</sup>

B. *Disposition of the Pico Case*

Five students and their parents challenged the school board's removal of the books. They claimed the removal of the books violated their right of free speech and sought declaratory and injunctive relief

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<sup>12</sup>102 S. Ct. 2799, 2803 n.3. The books removed from the high school libraries were *Slaughter House Five* by Kurt Vonnegut, Jr.; *The Naked Ape* by Desmond Morris; *Down These Mean Streets* by Piri Thomas; *Best Short Stories by Negro Writers* edited by Langston Hughes; *Go Ask Alice* of anonymous authorship; *Laughing Boy* by Oliver LaFarge; *A Hero Ain't Nothin' But A Sandwich* by Alice Childress; *Soul on Ice* by Eldridge Cleaver; and *Black Boy* by Richard Wright.

The book removed from the junior high school library was *A Reader for Writers* edited by Jerome Archer.

<sup>13</sup>*The Fixer* by Bernard Malamud was being used in a twelfth grade literature course.

<sup>14</sup>102 S. Ct. at 2803 n.4.

<sup>15</sup>*Id.* at 2804-05. The books which the board permanently removed were *The Fixer*, *Go Ask Alice*, *Best Short Stories by Negro Writers*, *Slaughter House Five*, *The Naked Ape*, *Down These Mean Streets*, *A Reader for Writers*, *Soul on Ice*, and *A Hero Ain't Nothin' But A Sandwich*.

against the board and against individual school board members.<sup>16</sup> The district court issued a summary judgment for the school board<sup>17</sup> because it found that a principal function of public education was to transmit basic values of the community and that a content-based decision to remove books was in keeping with that function.<sup>18</sup> The court added that a student may have standing to sue in such a case under a "right to receive information" theory.<sup>19</sup>

The decision was appealed to the United States Court of Appeals for the Second Circuit where the three-judge panel, in a split decision, remanded the case for trial.<sup>20</sup> In ordering the case remanded Judge Sifton pointed to "irregular and ambiguous handling" of the removal decision which could suppress freedom of expression<sup>21</sup> and to school board action based on personal, moral, and political reasons as factors which required the school board to defend its actions.<sup>22</sup> The concurring judge urged a remand to determine the motivation of the school board in removing the books and to determine if such a removal would suppress ideas.<sup>23</sup> The third judge dissented on the basis that schools can regulate indecent language and that the school board was doing so when it removed the books.<sup>24</sup>

The Supreme Court upheld the appellate court decision to remand the case for trial.<sup>25</sup> The Court issued seven opinions, however, which reflected some of the concerns and conflicting interests in such library cases. In deciding to remand the case, Justice Brennan, joined by Justices Marshall and Stevens, said removal of library books may be constitutional depending on the motivation of the school board which removed them, but that school boards do not have an absolute discretion to remove books.<sup>26</sup> He also said students have a right of access to information under narrow circumstances—when books are *removed* from school *libraries*.<sup>27</sup> Justice Blackmun concurred in part, but not in the section of the opinion endorsing the right of access to information for students.<sup>28</sup> Justice White claimed a decision based on con-

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<sup>16</sup>474 F. Supp. 387, 394 (E.D.N.Y. 1979). The district court reduced all five causes of action under the federal and state constitutions and 42 U.S.C. § 1983 to a single claim of free speech and academic freedom.

<sup>17</sup>474 F. Supp. at 398.

<sup>18</sup>*Id.* at 396.

<sup>19</sup>*Id.* at 397.

<sup>20</sup>638 F.2d 404 (2d Cir. 1980).

<sup>21</sup>*Id.* at 415.

<sup>22</sup>*Id.* at 417.

<sup>23</sup>*Id.* at 438 (Newman, J., concurring).

<sup>24</sup>*Id.* at 425 (Mansfield, J., dissenting). The judge also quoted examples of objectionable language contained in the books. *Id.* at 419-22 n.1.

<sup>25</sup>102 S. Ct. 2799 (1982) (plurality opinion).

<sup>26</sup>*Id.* at 2810.

<sup>27</sup>*Id.* at 2805-09.

<sup>28</sup>*Id.* at 2812-16.

stitutional issues was unnecessary but concurred in the judgment to remand to determine the school board's motivation.<sup>29</sup>

Chief Justice Burger and Justices Powell, Rehnquist and O'Connor dissented from the decision to remand the case. Chief Justice Burger dissented saying that students have no right of access to particular books in the school library and that the school board has a right and a duty to make content-based decisions about books in order to transfer fundamental values to the students.<sup>30</sup> Justice Powell repeated some of Justice Burger's criticisms and attached an appendix of less-than-refined passages from the books.<sup>31</sup> Justice Rehnquist, joined by Justices Burger and Powell, said the right to receive information in a school setting is unsupported by past decisions and is contrary to the nature of inculcative education.<sup>32</sup> Justice O'Connor said that if a school board can select books for a library, it can remove them.<sup>33</sup>

## II. THE SETTING: EARLIER CASES

*Board of Education v. Pico*<sup>34</sup> was not the first time the federal courts have wrestled with the powers of local school authorities or even with the role of school libraries. At least seven other school library cases have been decided by the federal courts, six of which were decided before the Supreme Court granted certiorari to hear the *Pico* case.<sup>35</sup> The school library decisions have recognized that state and local officials have primary authority over the administration of public schools.<sup>36</sup> Many of these decisions also have recognized that, in order to exercise such authority, local school boards have broad discretionary powers.<sup>37</sup>

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<sup>29</sup>*Id.* at 2816-17.

<sup>30</sup>*Id.* at 2818-19.

<sup>31</sup>*Id.* at 2822-23. *See id.* at 2823 app.

<sup>32</sup>*Id.* at 2830-31.

<sup>33</sup>*Id.* at 2835.

<sup>34</sup>474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd and remanded*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

<sup>35</sup>*Scheck v. Baileyville School Comm.*, 530 F. Supp. 679 (D. Me. 1982); *Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438 (2d Cir. 1980); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *Presidents Council v. Community School Bd. Number 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

<sup>36</sup>*See, e.g., Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 579-80 (6th Cir. 1976); *Scheck v. Baileyville School Comm.*, 530 F. Supp. 679, 688 (D. Me. 1982).

<sup>37</sup>*See, e.g., Pico v. Board of Educ.*, 638 F.2d 404, 427 (2d Cir. 1980) (Mansfield, J., dissenting), *aff'd*, 102 S. Ct. 2799 (1982); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980).

In acknowledging such authority and discretionary powers, courts often refer to language contained in Supreme Court cases such as *Epperson v. Arkansas*,<sup>38</sup> *West Virginia State Board of Education v. Barnette*,<sup>39</sup> and *Ambach v. Norwick*.<sup>40</sup> In some of these same cases, however, the Supreme Court has recognized that school authority can be limited when a constitutional value is at stake.<sup>41</sup> Accordingly, local authorities have been overruled when they prohibited the teaching of evolution,<sup>42</sup> when they required children to salute the flag,<sup>43</sup> and when they disciplined students or teachers for wearing black armbands in protest of the Vietnam War.<sup>44</sup> When a basic constitutional guarantee, that of free speech, for example, is implicated, however, the school authorities can impose limits on that freedom under certain conditions.<sup>45</sup> Defining those conditions and balancing the interests have caused considerable debate.<sup>46</sup>

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<sup>38</sup>393 U.S. 97 (1968). "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operations of school systems . . ." *Id.* at 104.

<sup>39</sup>319 U.S. 624 (1943). "Boards of Education . . . have, of course, important, delicate, and highly discretionary functions . . ." *Id.* at 637.

<sup>40</sup>441 U.S. 68 (1979). "[W]e look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role . . . . [They] may be regarded as performing a task 'that go[es] to the heart of representative government.'" (citations omitted). *Id.* at 75-76 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

<sup>41</sup>*See, e.g., West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *West Virginia State Bd. of Educ.*, Justice Jackson, after admitting that local authorities have "highly discretionary functions," added that the functions must be performed within the limits of the Bill of Rights. "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.* at 637.

<sup>42</sup>*Epperson v. Arkansas*, 393 U.S. 97 (1968).

<sup>43</sup>*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>44</sup>*Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). *See also James v. Board of Educ.*, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

<sup>45</sup>*See Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. at 509 (limits could be imposed if exercising conduct would create disruption).

<sup>46</sup>*Compare Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (upholding flag salute requirement to encourage patriotism in schools) *with West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down flag salute requirement as infringing on first amendment rights of students).

The debate often centers on whether schools should impress values on students or whether schools should provide a marketplace of ideas. Those court opinions that have supported locally elected school authorities have relied upon the school's role as an inculcator of community values. *See Pico*, 102 S. Ct. 2799, 2819-20 (1982) (Burger, C.J., dissenting); *id.* at 2823 (Powell, J., dissenting); *id.* at 2832 (Rehnquist, J., dissenting); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1303 (7th Cir. 1980). *See also, Goss v. Lopez*, 419 U.S. 565, 593 (1973) (Powell, J., dissenting) (schools as inculcators

For the past decade, much of that debate has centered around school libraries. School boards have won the debate in only three cases,<sup>47</sup> and only one of those decisions<sup>48</sup> did not base the holding, at least in part, on the acceptability of the school board's motive.<sup>49</sup> The other decisions weighed the students' right to receive the information contained in the books against the traditional authority lodged in the school boards and came out on the side of the students.<sup>50</sup>

In *Presidents Council v. Community School Board*,<sup>51</sup> a group of parents, students, teachers and a librarian challenged a school board decision to remove a novel from junior high libraries. In an unreported decision, the trial court dismissed the plaintiffs' claim that their first amendment rights were violated. On appeal, the United States Court of Appeals for the Second Circuit affirmed the dismissal saying that a school board has the authority to select books and that there is no difference between selection of books and removal of books.<sup>52</sup> The court rejected an argument that books once shelved gain tenure. The court said removal created no impediment to freedom of expression and that a school board has authority to remove books if they are obsolete, irrelevant, or improperly selected.<sup>53</sup> Although the Supreme Court refused to grant certiorari,<sup>54</sup> Justice Douglas dissented and raised as material issues academic freedom, the right to know, learn and hear, and a determination whether schools are a marketplace of ideas or an inculcator of values.<sup>55</sup>

Four years later, an Ohio school board refused to purchase two textbooks and ordered two other books removed from the high school library. In *Minarcini v. Strongsville City School District*,<sup>56</sup> five students and their parents challenged the school board action claiming that the removal violated their first and fourteenth amendment rights. The trial court dismissed the case finding that no such rights had been

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of understanding rules and obedience); *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838, 843 (2d Cir. 1977) (referring to "basic community values" as rationale for requiring teachers to wear ties).

<sup>47</sup>*Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438 (2d Cir. 1980); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980); *Presidents Council v. Community School Bd. Number 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

<sup>48</sup>*Presidents Council v. Community School Bd. Number 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

<sup>49</sup>See *supra* note 11 and *infra* notes 87-89 and accompanying text.

<sup>50</sup>See *infra* notes 55-71 & 83-86 and accompanying text.

<sup>51</sup>457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

<sup>52</sup>457 F.2d at 293.

<sup>53</sup>*Id.*

<sup>54</sup>409 U.S. 998 (1972).

<sup>55</sup>*Id.* at 998-1000.

<sup>56</sup>541 F.2d 577 (6th Cir. 1976), *rev'g* 384 F. Supp. 698 (N.D. Ohio 1974).

violated.<sup>57</sup> The United States Court of Appeals for the Sixth Circuit agreed that failure to purchase the textbooks was not a constitutional violation,<sup>58</sup> but it reversed on the library issue.<sup>59</sup> The reversal was based on the "right of students to receive information"<sup>60</sup> and on a finding that the books were removed because of content the board members found distasteful.<sup>61</sup> The opinion also referred to the school library as a marketplace of ideas dedicated to broad dissemination of ideas<sup>62</sup> that should not be narrowed with the excuse that the removed books were available at other times, in other places or under different circumstances.<sup>63</sup>

School library issues returned to the courtroom in 1978 in *Right to Read Defense Committee v. School Committee*<sup>64</sup> when students, teachers, and a librarian challenged a Massachusetts school board removal of an anthology from a high school library. The court held that removing the book because the school board objected to the language and theme of one poem violated the first amendment rights of the students. The court said that, by purchasing the book, the school board created a constitutionally protected right that, once created, could not be limited without demonstrating a substantial and legitimate government interest.<sup>65</sup> The court said that offensive language did not create such an interest<sup>66</sup> and termed the prospect of successive school boards sanitizing libraries of views divergent from their own "alarming."<sup>67</sup>

A year later, in *Salvail v. Nashua Board of Education*,<sup>68</sup> students, teachers, and parents sued the school board and the school superintendent after the school board ordered copies of a feminist magazine removed from the high school library. The school board claimed that the magazine was unsuitable for teen-agers.<sup>69</sup> The court held that such

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<sup>57</sup>384 F. Supp. 698 (N.D. Ohio 1974).

<sup>58</sup>541 F.2d at 580.

<sup>59</sup>*Id.* at 583.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.* at 582.

<sup>62</sup>*Id.* at 582-83 (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Abrams v. United States*, 250 U.S. 616 (1919)).

<sup>63</sup>541 F.2d at 582 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974); *Schneider v. State*, 308 U.S. 147, 163 (1939)).

<sup>64</sup>454 F. Supp. 703 (D. Mass. 1978).

<sup>65</sup>*Id.* at 712 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Griffin v. Illinois*, 351 U.S. 12 (1956)).

<sup>66</sup>454 F. Supp. at 713-14 (quoting *Cohen v. California*, 403 U.S. 15, 26 (1971); *Keefe v. Geanakos*, 418 F.2d 359, 361 (1st Cir. 1969)).

<sup>67</sup>454 F. Supp. at 714.

<sup>68</sup>469 F. Supp. 1269 (D.N.H. 1979).

<sup>69</sup>*Id.* at 1271-72.

a removal violated the constitutional rights of the students by denying them access to the material the magazine contained.<sup>70</sup> The court added that shielding students from vulgarity was not such a substantial and legitimate government interest to warrant infringement of first amendment rights and rejected the contention that alternate sources for the material excused the removal.<sup>71</sup>

In 1980, three library cases reached the United States courts of appeals: *Pico v. Board of Education*,<sup>72</sup> *Zykan v. Warsaw Community School Corp.*<sup>73</sup> and *Bicknell v. Vergennes Union High School Board of Directors*.<sup>74</sup>

In *Zykan*, the school board in Warsaw, Indiana, voted to discontinue using certain textbooks, refused to order other textbooks, and ordered a book removed from the school library. One student and a former student claimed the actions violated their first amendment right to know. The trial court dismissed saying the complaint failed to allege a violation of a first amendment right to receive constitutionally protected communication. The judge added that a school board may prohibit use of textbooks or remove library books to shape students into good citizens and that officials may base such determinations on personal moral beliefs.<sup>75</sup> The United States Court of Appeals for the Seventh Circuit vacated the judgment and remanded with leave for the plaintiffs to amend their complaint.<sup>76</sup> The circuit court recognized a qualified freedom to hear subject to guidance from the school board.<sup>77</sup> It rejected the argument that a book cannot be removed based on content after it has been shelved<sup>78</sup> and said a school board may remove material as long as the removal does not impair a student's ability to investigate.<sup>79</sup>

In *Bicknell v. Vergennes Union High School Board of Directors*,<sup>80</sup> a companion case to *Pico*, the Second Circuit affirmed a district court decision allowing a school board to remove a book from a high school library. The school board removed one book from the library and placed another on a restricted shelf. The trial court dismissed a claim by students, parents, and library employees that student first amend-

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<sup>70</sup>*Id.* at 1274.

<sup>71</sup>*Id.* at 1275.

<sup>72</sup>638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

<sup>73</sup>631 F.2d 1300 (7th Cir. 1980).

<sup>74</sup>638 F.2d 438 (2d Cir. 1980).

<sup>75</sup>631 F.2d at 1303.

<sup>76</sup>*Id.* at 1308-09.

<sup>77</sup>*Id.* at 1304-05.

<sup>78</sup>*See* *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1272-73 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 712 (D. Mass. 1978).

<sup>79</sup>631 F.2d at 1308.

<sup>80</sup>638 F.2d 438 (2d Cir. 1980).

ment rights were violated.<sup>81</sup> In a divided opinion, the Second Circuit pointed out that no one suggested that the circumstances surrounding the removal would inhibit freedom of expression.<sup>82</sup>

While *Pico* was awaiting Supreme Court consideration, *Sheck v. Baileyville School Committee*<sup>83</sup> was decided. After a school board in Maine removed a book from the high school library, a district court said that information and ideas in books placed in school libraries by proper authorities were protected by the first amendment.<sup>84</sup> It added that access to such books can be limited only by "precise ascertainable standards"<sup>85</sup> and that objectionable language was not a legitimate reason to restrict student access to the book without some showing that exposure to the language might harm students.<sup>86</sup>

Most of the school boards faced with challenges in school library cases have defended their actions on the basis of their broad authority and on the fact that they were motivated by objectionable language contained in the materials removed.<sup>87</sup> Courts that found in favor of the challengers in such cases have either rejected the motivational claims<sup>88</sup> or said that objectionable language was not a substantial enough state interest to allow the books to be removed.<sup>89</sup> Opinions in other types of school cases, however, have focused not on the motivation but on the results of school board actions.<sup>90</sup> Some fourteenth amendment cases, however, have used a motivation or purpose test in finding a variety of other types of state actions unconstitutional.<sup>91</sup>

The *Pico* decision is unusual in that the motivation of the school board was the central issue in determining whether a constitutional violation had occurred in a first amendment free speech case.<sup>92</sup>

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<sup>81</sup>475 F. Supp. 615 (D. Vt. 1979).

<sup>82</sup>638 F.2d at 441.

<sup>83</sup>530 F. Supp. 679 (D. Me. 1982).

<sup>84</sup>*Id.* at 689.

<sup>85</sup>*Id.* at 690 (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967)).

<sup>86</sup>530 F. Supp. at 691.

<sup>87</sup>*E.g.*, *Pico v. Board of Educ.*, 638 F.2d 404, 411 (2d Cir. 1980); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 687 (D. Me. 1982).

<sup>88</sup>*E.g.*, *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1274 (D.N.H. 1979).

<sup>89</sup>*E.g.*, *id.* at 1275; *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978).

<sup>90</sup>*See* *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *Shelton v. Tucker*, 364 U.S. 479 (1960); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *James v. Board of Educ.*, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

<sup>91</sup>Motivation has been a frequent and important consideration in cases concerning school desegregation, *Keyes v. School Dist.*, 413 U.S. 189 (1973); hiring policies, *Washington v. Davis*, 426 U.S. 229 (1976); and voting rights, *Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>92</sup>102 S. Ct. 2799, 2810 (1982), *aff'g* 638 F.2d 404 (2d Cir. 1980). The only other

Although such a finding is not unusual in school library cases, it is unusual in a Supreme Court decision involving the first amendment.

### III. RIGHT OF ACCESS

Although *Board of Education v. Pico*<sup>93</sup> suggested that a school board could violate the first amendment by removing books from a school library with improper motivation, there was no agreement as to whose right or exactly which right under the first amendment was being violated.<sup>94</sup> The earlier library cases exhibited similar confusion. One lower court suggested the right is tied to academic freedom,<sup>95</sup> and some of the library opinions have cited academic freedom cases.<sup>96</sup> Most courts, however, tied the right to the free speech clause of the first amendment as a type of silent speech and have referred to it as a right to receive information,<sup>97</sup> a right of access to information,<sup>98</sup> or a right to read.<sup>99</sup>

In *Pico*, the students who were denied access to the books removed from the library claimed a right of access to information under the first amendment and were deemed proper plaintiffs by the trial court.<sup>100</sup> The Supreme Court plurality agreed that students do

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Supreme Court decision involving free speech in schools that relied on motivation was *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), but that case also concerned due process in the firing of a teacher and thus was not strictly a free speech case.

<sup>93</sup>102 S. Ct. 2799 (1982).

<sup>94</sup>For a detailed discussion of which first amendment right is at stake in school library cases, see *Recent Developments, Removal of Public School Library Books: The First Amendment Versus the Local School Board*, 34 VAND. L. REV. 1407, 1428-33 (1981).

<sup>95</sup>*Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980).

<sup>96</sup>*Keyishian v. Board of Regents*, 385 U.S. 589 (1967), cited in *Board of Educ. v. Pico*, 102 S. Ct. at 2809; *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710 (D. Mass. 1978). *Shelton v. Tucker*, 364 U.S. 479 (1960), quoted in *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1275 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710 (D. Mass. 1978). *Meyer v. Nebraska*, 262 U.S. 390 (1923), cited in *Board of Educ. v. Pico*, 102 S. Ct. at 2805; *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 686 (D. Me. 1982); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710 (D. Mass. 1978).

<sup>97</sup>*Board of Educ. v. Pico*, 102 S. Ct. at 2814, 2818; *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 583 (6th Cir. 1976); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 686 (D. Me. 1982). See also *Pratt v. Independent School Dist.*, 670 F.2d 771, 779 (8th Cir. 1982) (film removed from curriculum).

<sup>98</sup>*Board of Educ. v. Pico*, 102 S. Ct. at 2818 (Burger, J., dissenting); *Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438, 442 (2d Cir. 1980) (Sifton, J., dissenting); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 684 (D. Me. 1982).

<sup>99</sup>*Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 714 (D. Mass. 1978).

<sup>100</sup>474 F. Supp. 387, 394 (E.D.N.Y. 1979).

have such a right under very narrow circumstances,<sup>101</sup> but the other six members of the Supreme Court disagreed. Just as the plurality had difficulty expressing the exact nature of the right it sought to protect, the opinions gave only a cursory review of the origins of that right.<sup>102</sup>

### A. *Origin of the Right of Access*

Any recognition of a student right of access to information depends on the confluence of two distinct lines of cases. The first is recognition of a right of access to information,<sup>103</sup> the second is an extension of academic freedom and information rights of teachers and students.<sup>104</sup> Both lines of cases have emerged in relatively recent years, and both have involved rights that the courts recognized as being of limited scope.

The first line, which recognized the rights of recipients of information, has been tied to the free speech clause of the first amendment, a clause which has traditionally protected persons wishing to disseminate information. Although as early as 1943 the Supreme Court mentioned the rights of recipients of information,<sup>105</sup> these rights received little attention from the courts until the late 1960's. In the late 1960's, the Supreme Court's recognition that persons who received information had a right to receive that information slowly emerged in cases concerning postal regulations,<sup>106</sup> pornography,<sup>107</sup> broadcasting<sup>108</sup> and contraceptives.<sup>109</sup> In the 1970's, this right of access was further delineated in *Procunier v. Martinez*<sup>110</sup> and *Virginia State Board of*

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<sup>101</sup>102 S. Ct. at 2809-10.

<sup>102</sup>*Id.* at 2808.

<sup>103</sup>See *infra* notes 105-17 and accompanying text.

<sup>104</sup>See *infra* notes 119-20.

<sup>105</sup>*Martin v. Struthers*, 319 U.S. 141 (1943). "[F]reedom of speech . . . embraces the right to distribute literature . . . and necessarily protects the right to receive it." *Id.* at 143.

<sup>106</sup>*Lamont v. Postmaster General*, 381 U.S. 301 (1965). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Id.* at 308 (Brennan, J., concurring).

<sup>107</sup>*Stanley v. Georgia*, 394 U.S. 557 (1969). "[T]he Constitution protects the right to receive information and ideas." *Id.* at 564.

<sup>108</sup>*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization . . . by the Government . . . . It is the right of the public to receive . . . access to . . . ideas and experiences which is crucial here." *Id.* at 390.

<sup>109</sup>*Griswold v. Connecticut*, 381 U.S. 479 (1965). "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id.* at 482.

<sup>110</sup>416 U.S. 396 (1974). The Court stated:

*Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>111</sup> The right of access to information has never been clearly defined, but the Supreme Court has stated that the right could be limited if balanced against a substantial government interest.<sup>112</sup>

Some lower court decisions have indicated the right to receive information may depend on the right of someone else to disseminate information,<sup>113</sup> and one Supreme Court opinion described the right to disseminate and the right to receive as "two sides of the same coin."<sup>114</sup> Other opinions have suggested that the suppression of one party's access to information can create an atmosphere whereby another party's dissemination of information may be hindered<sup>115</sup> and that suppressing access to information ultimately suppresses dissemination of information by limiting the source of ideas that one party would use in forming opinions.<sup>116</sup> These cases involved adults, however, and there is some feeling that the rights of minors in this area may not be coextensive with those of their elders.<sup>117</sup>

Some library cases sought to extend the right of access to information to students.<sup>118</sup> For the most part, the courts based this extension on language in cases involving student and teacher rights to disseminate information<sup>119</sup> and cases involving academic freedom.<sup>120</sup> In

Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship . . . necessarily impinges on the interest. [T]he . . . interest is grounded in the First Amendment's guarantee of freedom of speech.

*Id.* at 408.

<sup>111</sup>425 U.S. 748 (1976). "Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both." *Id.* at 756.

<sup>112</sup>*Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

<sup>113</sup>*E.g.*, *Pico v. Board of Educ.*, 638 F.2d at 429 (Mansfield, J., dissenting).

<sup>114</sup>*Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting).

<sup>115</sup>*Pico v. Board of Educ.*, 638 F.2d at 434 (Newman, J., concurring).

<sup>116</sup>*See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

<sup>117</sup>*See Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304-05 (7th Cir. 1980).

<sup>118</sup>*Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 583 (6th Cir. 1976); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 685 (D. Me. 1982); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 714 (D. Mass. 1978).

<sup>119</sup>In a case involving students who were punished for wearing armbands to protest the Vietnam war, the Supreme Court said, "[Students do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969), *quoted in Board of Educ. v. Pico*, 102 S. Ct. at 2807; *Pratt v. Independent School Dist.*, 670 F.2d 771, 776 (8th Cir. 1982); *Pico v. Board of Educ.*, 638 F.2d at 432 (Newman, J., concurring).

<sup>120</sup>In a case involving teachers who were ordered to sign loyalty oaths, the Supreme Court said, "[T]he First Amendment . . . does not tolerate laws which cast a pall of

school library cases, courts have consistently limited this right of access to circumstances where information had once been offered and now was being removed.<sup>121</sup> They have also limited the right by applying it primarily to libraries, allowing school boards almost complete authority over curriculum.<sup>122</sup> Those who have espoused these limitations may have done so out of respect for school board autonomy and for statutes giving local school authorities control over curricula.<sup>123</sup> Such limitations, however, have handed ammunition to those who oppose extending this right to students.

### B. Criticizing the "Right"

Because a limited right tends to favor practicality over doctrinal purity and courts already are uncomfortable backing youthful challenges to adult authority,<sup>124</sup> no student right of access to information—even in a limited sense—was authorized in *Pico*. The plurality endorsed such a right, but Justices Blackmun and White did not join that part of the decision, and the dissenters attacked it vigorously. The dissenters damned the right the students sought as too limited to qualify as a right, while recognizing that a full-blown right of access would be too intrusive to school operations to find many supporters.

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orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), *quoted in* *Board of Educ. v. Pico*, 102 S. Ct. at 2809; *Pratt v. Independent School Dist.*, 670 F.2d 771, 776 (8th Cir. 1982); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710 (D. Mass. 1978).

In a case involving teachers who were required to file a list of organizations to which they belonged, the Court said, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), *quoted in* *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710 (D. Mass. 1978).

<sup>121</sup>*Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1272 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 711 (D. Mass. 1978). *See infra* notes 128-36 and accompanying text. *See also* *Pratt v. Independent School Dist.*, 670 F.2d 771, 776 (8th Cir. 1982) (film removed from curriculum).

<sup>122</sup>*See* *Zykan v. Warsaw Community School Corp.*, 631 F.2d at 1304-07; *Minarcini v. Strongsville City School Dist.*, 541 F.2d at 579-80; *Presidents Council v. Community School Bd. Number 25*, 457 F.2d at 290; *Pico v. Board of Educ.*, 474 F. Supp. at 397 (dismissal of curriculum claim not appealed). *See also* *Cary v. Board of Educ.*, 598 F.2d 535 (10th Cir. 1979) (school board decision not to use certain textbooks upheld).

<sup>123</sup>*See, e.g.,* IND. CODE. §§ 20-5-2-1 to -2 (1976), *id.* § 20-10.1-4-4 (1976), *cited in* *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980); N.Y. EDUC. LAW §§ 701, 1709 (McKinney 1969), *quoted in* *Pico v. Board of Educ.*, 638 F.2d at 422 n.2 (Mansfield, J., dissenting); OHIO REV. CODE ANN. § 3329.07 (Page 1975) *quoted in* *Minarcini v. Strongsville City School Dist.*, 541 F.2d at 579.

<sup>124</sup>*See, e.g.,* *Pico v. Board of Educ.*, 102 S. Ct. at 2821 (Burger, C.J., dissenting); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304, 1307 (7th Cir. 1980).

Although the dissenters in *Pico* made much of the supposed inconsistencies of granting a limited right of access to information to high school students, they ignored the fact that many other first amendment rights are less than absolute.<sup>125</sup> The right of association is limited by regulations on subversive activities and by conspiracy laws.<sup>126</sup> The right of free press does not immunize publications from libel, invasion of privacy, obscenity and copyright concerns.<sup>127</sup> The right of free speech can be restricted by regulations involving time, place and manner. In reality few, if any, substantive rights are absolute and unfettered. The fact that other rights exist despite occasional limitations placed upon them did not, however, prevent the *Pico* dissenters from attacking the proposal of a limited right of access to information for high school students. Their criticisms lay in three major areas.

1. *Removal v. Failure to Acquire*.—In *Pico*, Chief Justice Burger, who did not recognize a student right of access to information, asked why the right should apply only when a school board removes books and not when a school board fails to acquire books. He referred to the distinction as a “coincidence of timing.”<sup>128</sup> Justice Blackmun, who concurred in the judgment, also questioned whether there is a theoretical distinction between removal of and failure to acquire books. Although he refused to endorse a student right of access, he agreed with one of the court of appeals’ opinions in *Pico* that there is a practical and evidentiary distinction.<sup>129</sup>

Discussions about the distinction between removal of and failure to acquire have appeared both in library case opinions and law review articles.<sup>130</sup> The argument that a right of access to information must encompass the right to demand that materials be purchased as well as the right to require that materials not be removed obfuscates the issue already before the court: whether students have a right to require that information, once offered, not be removed arbitrarily. As Judge Newman of the Second Circuit explained in the lower court

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<sup>125</sup>See J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 720-22 (1978).

<sup>126</sup>See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-23 (1978).

<sup>127</sup>See, e.g., *Roth v. United States*, 354 U.S. 476, 481-84 (1954); L. TRIBE, *supra* note 126 at § 12-12.

<sup>128</sup>102 S. Ct. at 2821 (Burger, C.J., dissenting).

<sup>129</sup>*Id.* at 2814 n.1 (Blackmun, J., concurring in part) (citing 638 F.2d at 436 (Newman, J., concurring)).

<sup>130</sup>See 102 S. Ct. at 2821 (Burger, C.J., dissenting); *id.* at 2833 (Rehnquist, J., dissenting). See generally, Note, *Schoolbooks, School Boards, and the Constitution*, 80 COLUM. L. REV. 1092, 1116 (1980); Comment, *Constitutional Law—First Amendment—Student’s Right to Receive Information Precludes Board’s Removal of Allegedly Offensive Books From High School Library*, 30 VAND. L. REV. 85, 98 (1977).

opinion in *Pico*, there are many reasons for not acquiring books, and generally the failure to acquire a book does not attract enough public notice to create an atmosphere likely to suppress ideas.<sup>131</sup> He wrote: "There are many reasons why a book is not acquired, the most obvious being limited resources, but there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity."<sup>132</sup>

If in the future a school board failed to acquire a book and surrounded its decision with public pronouncements, as Justice Rehnquist hypothesized in *Pico*,<sup>133</sup> a court could decide whether to extend the first amendment right to such a case. Until then the practical, evidentiary advantage in generally limiting the right of access to removal cases outweighs the theoretical inconsistency in recognizing such a limited right.

Other courts have distinguished between removal of and failure to acquire books by claiming that a school board once having acted by placing the book in the school library, though not compelled to acquire the book, has created a constitutionally-protected interest that cannot be withdrawn arbitrarily or with improper motivation.<sup>134</sup> Critics of this view have likened it to giving a book tenure.<sup>135</sup> But as the court of appeals' opinion in *Pico* points out, the right at issue is not that of the book, but that of the students and other members of the school community.<sup>136</sup>

2. *Library v. Curriculum*.—Critics of extending the right of access to students also have questioned whether such a right can attach to school libraries and not the curriculum.<sup>137</sup> They have based their criticism in part on their view that school libraries are an instructional arm of the school and not an alternative institution for learning.<sup>138</sup> Critics also have suggested that because libraries are optional, they are more like dessert and that rights should attach only to the substantive, compulsory entities that are the meat and potatoes of society.<sup>139</sup> Proponents of a right of access might respond that the

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<sup>131</sup>638 F.2d 404, 434-36 (2d Cir. 1980).

<sup>132</sup>*Id.* at 436.

<sup>133</sup>102 S. Ct. at 2833.

<sup>134</sup>*Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 689 n.13 (D. Me. 1982); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1272-73 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 712 (D. Mass. 1978).

<sup>135</sup>*See Presidents Council v. Community School Bd. Number 25*, 457 F.2d 289, 293 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

<sup>136</sup>638 F.2d at 435.

<sup>137</sup>*See, e.g., Board of Educ. v. Pico*, 102 S. Ct. at 2821 (Burger, C.J., dissenting); *id.* at 2832 (Rehnquist, J., dissenting).

<sup>138</sup>*Id.* at 2832 (Rehnquist, J., dissenting).

<sup>139</sup>*Id.* at 2821 (Burger, C.J., dissenting).

difference between library and curriculum lies in the lack of state interest involved in optional reading material as compared to the amount of state interest involved in required reading for the students. Once again, the criticism has a theoretical appeal but avoids the library issue actually before the court.

The seeming inconsistency of attaching the right to library books and not to textbooks may be explained by pointing out that the right of access is tied not only to information already disseminated but information yet to be disseminated.<sup>140</sup> While school authorities routinely revise curricula and routinely remove old textbooks to make way for new ones, such is not the case with libraries. Because textbook removal is routine, it lacks the symbolic influence that removal of a library book has.<sup>141</sup> Because textbooks are removed routinely, there is little chance that removing one will suggest that the ideas contained within a certain book are officially disfavored. The rarer occurrence, the removal of a library book, is more likely to raise the inference that certain ideas are unacceptable and that a wise student will not voice such ideas unless he too wishes to incur official disfavor.

Additionally, because curricula are routinely revised, school boards usually have established procedures<sup>142</sup> to make such decisions, and abuses are less likely to occur than in periodic raids on school libraries.<sup>143</sup> Curriculum decisions, therefore, have been left to the school boards, and there the boards are free to inculcate values through emphasis of ideas.<sup>144</sup> When abuses concerning curricula have occurred, however, courts have intervened.<sup>145</sup>

Perhaps the distinction between classroom and library is again one of expediency. While courts recognize that schools are marketplaces of ideas,<sup>146</sup> they also realize that specific information must be disseminated in classrooms in a relatively short period of time. Such is not the case in a library.<sup>147</sup> Also, students in a classroom are much

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<sup>140</sup>See *supra* notes 113-17 and accompanying text.

<sup>141</sup>See *Pico v. Board of Educ.*, 638 F.2d at 434 (Newman, J., concurring).

<sup>142</sup>See *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1303 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 579-80 (6th Cir. 1976).

<sup>143</sup>For a discussion of periodic raids on school libraries that have *not* been challenged in court, see *Mind Benders*, Indianapolis Star, Aug. 24, 1982, at 8, col. 1.

<sup>144</sup>See *Board of Educ. v. Pico*, 102 S. Ct. at 2816 (Blackmun, J., concurring). *But see id.* at 2820-21 (Burger, C.J., dissenting).

<sup>145</sup>See *Pratt v. Independent School Dist.*, 670 F.2d 771 (8th Cir. 1982); *Loewen v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss. 1980).

<sup>146</sup>*E.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 687 (D. Me. 1982).

<sup>147</sup>See *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 687 (D. Me. 1982); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978), *cited in* *Board of Educ. v. Pico*, 102 S. Ct. at 2809.

more of a captive audience whose sensibilities might be better shielded from unnecessary controversy or possible offensiveness<sup>148</sup> than those who seek out ideas in the voluntary atmosphere of the library. Because schools appear to serve both as marketplaces of ideas and disseminators of specific information, the courts may recognize that the least obtrusive place for the hubbub of the marketplace is a voluntary rather than a compulsory atmosphere.<sup>149</sup>

3. *Alternate Sources.*—The third criticism against extending the right of access to information to students is that removal does not deny the students' access to the books but merely restricts access in the schools.<sup>150</sup> Allowing the consideration of other sources and of other places to affect book removal cases presupposes two conditions: first, that removals are not based on the contents of the books, and second, that public schools are not public or semi-public forums.<sup>151</sup> If either condition existed, the availability of alternative sources of information might excuse the removal of library books by school officials. Schools, however, have been recognized as semi-public forums closely tied to expression though not created for actual public interchange of ideas.<sup>152</sup> The alternative source criticism also fails in this context as books are a peaceful form of expression scarcely incompatible with the purpose of public education.

If book removal is regarded as being based on contents, which it would seem to be, the alternative source criticism fails even earlier.<sup>153</sup> Any harm that the contents of the books could bring about could be averted by further exchange of ideas, because the schools could counter harmful ideas by emphasizing ideas that are not harmful. Whenever more speech can eliminate injury that less speech is trying to avoid, suppression is deemed unnecessary.<sup>154</sup> Allowing the existence of alternate sources to support the removal of library books to prevent harm from "bad" language or ideas would be ironic because "alternative sources" in first amendment cases usually refers to the requirement that the state action be the least drastic means available.

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<sup>148</sup>*Cf.* *Close v. Lederle*, 424 F.2d 988 (1st Cir.), *cert. denied*, 400 U.S. 903 (1970) (school officials could withdraw permission to display art to shield captive audience from offensiveness).

<sup>149</sup>*See* *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978).

<sup>150</sup>*See* *Board of Educ. v. Pico*, 102 S. Ct. at 2821 (Burger, C.J., dissenting); *id.* at 2832-33 (Rehnquist, J., dissenting); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980).

<sup>151</sup>*See* L. TRIBE, *supra* note 126 § 12-20, at 684; *id.* § 12-20, at 682-84. *See generally id.* § 12-2, at 580-84.

<sup>152</sup>*See* *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 513 (1969); L. TRIBE, *supra* note 126 § 12-21, at 690.

<sup>153</sup>*See* L. TRIBE, *supra* note 126 § 12-8, at 602.

<sup>154</sup>*Id.* at 602-03 (citing *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977)).

Alternate sources do not lessen the symbolic significance of removal. As one of the court of appeals' opinions in *Pico* stated: "The impact of burning a book does not depend on whether every copy is on the fire."<sup>155</sup> Restraint on expression may not generally be justified by there being other times, places, or circumstances available for such expression.<sup>156</sup> Because the right of access is closely tied to the right of expression in a free society,<sup>157</sup> the same theory should apply.<sup>158</sup>

#### IV. WHAT RIGHT THEN?

*Board of Education v. Pico*<sup>159</sup> did establish that some first amendment interest tied to free speech could be violated, but it did not define what that interest is or to whom it belongs. The acceptance of students as proper plaintiffs<sup>160</sup> and the occasional rejection of others as plaintiffs in library cases<sup>161</sup> suggest that the right mainly rests with the students. *Pico* did not, however, authorize a full, affirmative right of access to information for students. Only three of the nine justices would be willing to do that.<sup>162</sup>

A majority of the Court did recognize that a school board can violate the first amendment by removing books from a library without proper motivation. In a sense, the Court has created a crime without a true victim. The violation would seem to be of a right of a free society not to have ideas suppressed by the government. Students who are the direct beneficiaries of the right as it exists in schools are the proper parties to report the violation but do not truly own that right. The students have enough interest in the right, and are injured enough when that right is violated, to bring the violation to the attention of the courts. In doing so, they represent the rest of society much as a prosecutor does when he files charges in a criminal case.

There is little or no precedent for a court recognizing a violation of a right without recognizing the right itself. There is slight prece-

<sup>155</sup>638 F.2d at 434 (Newman, J., concurring).

<sup>156</sup>*Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974); *Schneider v. State*, 308 U.S. 147, 163 (1939)).

<sup>157</sup>"The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin." *Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting).

<sup>158</sup>For a discussion of why alternative sources will not solve the problems created if books are allowed to be removed from school libraries, see O'Neill, *Libraries, Liberties and the First Amendment*, 42 U. CIN. L. REV. 209, 240-41 (1973).

<sup>159</sup>102 S. Ct. 2799 (1982).

<sup>160</sup>*E.g.*, *Pico v. Board of Educ.*, 474 F. Supp. at 397; *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 683 (D. Me. 1982).

<sup>161</sup>*E.g.*, *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 705 n.2 (D. Mass. 1978).

<sup>162</sup>102 S. Ct. at 2806-10.

dent, however, for the Court to allow a plaintiff to represent societal interests in Constitutional challenges.<sup>163</sup> *Pico* represents two main views. The plurality is consistent: students have a limited right of access to information;<sup>164</sup> society has a right not to have ideas suppressed;<sup>165</sup> and school boards do not have a right to remove books from school libraries with improper motivations.<sup>166</sup> The dissenters are also consistent: students have no such right of access in the school setting;<sup>167</sup> the societal interest at stake is the autonomy of elected school boards;<sup>168</sup> and school boards have authority to remove library books from school libraries.<sup>169</sup>

Any uncertainty or inconsistency in this matter rests with Justice Blackmun who recognized no affirmative right of access but some vague right not to have the state discriminate between ideas<sup>170</sup> and who agreed with the plurality that school boards may not remove books from school libraries with improper motivations. Justice White, by concurring, tacitly endorsed the limitations on the school board<sup>171</sup> while deferring discussion of the constitutional issues to the future. His view regarding what rights, if any, students have or society has was not stated. At any rate, Justices Blackmun and White are likely to cast the deciding votes determining what rights students, society, and school boards may or may not have regarding school libraries and book removal because the other justices have taken what seem to be firm positions.

## V. CONCLUSION

The *Pico* decision is significant not because it recognized a right, but because it recognized a limitation. Students received no affirmative right of access to information in this decision, but school boards were told that they do not have authority to restrict the flow of information except in certain circumstances. Exactly what those circumstances

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<sup>163</sup>The news media, for example, have traditionally based their claims on having a right of access to government meetings, records, and trials on the grounds that they act as a surrogate for the public. While never actually acknowledging that the news media play such a role, the Court has allowed newspapers standing to represent the public in suits. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

<sup>164</sup>*Board of Educ. v. Pico*, 102 S. Ct. at 2808-09.

<sup>165</sup>*See id.*

<sup>166</sup>*Id.* at 2810.

<sup>167</sup>*Id.* at 2818-19.

<sup>168</sup>*Id.* at 2819-21.

<sup>169</sup>*Id.*

<sup>170</sup>*Id.* at 2813-14.

<sup>171</sup>*Id.* at 2816-17. By remanding to determine motivation, Justice White agreed with the plurality that the motivation of the school board was crucial; had he agreed with the dissenters, the board's motivation would be irrelevant.

are has not been determined because improper motivation has not been adequately defined nor have questions about educational suitability, vulgarity and mixed motivation been answered. Moreover, the Supreme Court has confused the constitutional climate by being quick to apply a remedy without waiting to find or define a right.

If the confusion was created by a reluctance to endorse a limited right, the dissenters in *Pico* are questioning long-standing policies which recognize that first amendment rights can exist with limitations. If the dissenters are advancing criticisms of limited rights to mask a general reluctance to entertain student challenges to school board authority, their criticisms of a limited right are unprincipled.

The major source of the confusion, however, may lie with the concurring opinions of Justices Blackmun and White. Justice Blackmun's adherence to a societal right not to have the state discriminate between ideas unlocks a Pandora's box of questions about standing, which his opinion never addresses. Justice White, by attempting to sidestep the entire issue of whose right or what right is at stake, adds to the air of mystery that may continue to haunt school boards and courts in years to come. By showing a willingness to provide a remedy without a right, only one thing is certain: school board authority has been somehow limited, but no one can say exactly why.

JANICE E. KREUSCHER



# ABSCAM: Time for the United States Supreme Court to Clarify the Due Process Defense

## I. INTRODUCTION

Although the government should not be in the business of manufacturing crime, most people agree that certain types of crime can be detected and eradicated only through government involvement and some degree of government participation in those crimes.<sup>1</sup> Victimless vice crimes like narcotic offenses are the most obvious examples of these types of crimes; however, it is clear that bribery and political corruption are also victimless crimes that are not easily detected without government involvement.<sup>2</sup> Because the criminals involved in these victimless crimes have no reason to notify the authorities once a crime has been committed, the government officer or agent must actively assume a criminal role in the illegal transaction in order to trap the unwary participants. As illustrated by the FBI's recent ABSCAM<sup>3</sup> operation that was used to uncover political corruption, the techniques used by government agents in assuming their criminal roles may be extensive and complex.

Traditionally, the defense of entrapment has been available to a defendant who was caught as a result of government involvement in the crime.<sup>4</sup> According to the United States Supreme Court in *Sorrells v. United States*,<sup>5</sup> the entrapment defense lies "[w]hen the criminal design originates, not with the accused, but is conceived in the mind of government officers and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act . . . ."<sup>6</sup> Subsequent Supreme Court decisions have affirmed the

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<sup>1</sup>See Livermore, *Enforcement Workshop: ABSCAM Entrapment*, 17 CRIM. L. BULL. 69 (1981).

<sup>2</sup>See *id.* Of course, no crime is truly victimless. Although some types of crime may appear to leave no specific victims, society does suffer some detriment. The degree of damage inflicted upon society may be speculative, but clearly the democratic process is circumvented when a bribe comes between an elected official and his or her electorate.

<sup>3</sup>"ABSCAM" is an acronym for the words "Abdul Enterprises Ltd." and "scam." Abdul Enterprises Ltd. was a fictitious Arabian corporation that FBI agents used to attract corrupt persons and to front the "scam."

<sup>4</sup>See generally Note, *The Need for a Dual Approach to Entrapment*, 59 WASH. U.L.Q. 199 (1981) (police activity that "creates" criminal conduct may be grounds for the affirmative defense of entrapment).

<sup>5</sup>287 U.S. 435 (1932).

<sup>6</sup>*Id.* at 445 (quoting *Newman v. United States*, 299 F. 128, 131 (4th Cir. 1929)). *Sorrells* was the Supreme Court's first in-depth examination of the entrapment defense. *Sorrells* was ultimately persuaded by a prohibition agent to acquire illegal whiskey;

majority's position in *Sorrells* that the defense of entrapment is focused on the defendant's predisposition to commit the crime.<sup>7</sup> Thus, for the entrapment defense to succeed, it must be shown that the criminal design did not originate in the defendant's mind.<sup>8</sup> This requirement makes the defense subjective because "[t]he predisposition and criminal design of the defendant are relevant."<sup>9</sup> In simpler terms, predisposition refers to the degree to which the defendant was willing to become involved in the culpable activity before he was approached by government agents. One way to prove this willingness is by the defendant's ready acquiescence to commit the crime once he is contacted by government agents.<sup>10</sup> A majority of the Supreme Court has consistently maintained that the entrapment defense is based on legislative intent.<sup>11</sup> In *Sorrells*, the Court explained that Congress could not have intended that its statutes were to be enforced by tempting innocent persons.<sup>12</sup> In this context, "innocent" plainly refers to a non-predisposed defendant, one who had little or no desire to become involved in the culpable activity before he was approached. The Court has viewed itself as being bound by public policy to interpret statutes reasonably and not "to do violence to the spirit and purpose of the statute."<sup>13</sup> By reading into the criminal statutes a congressional intent that entrapped defendants were to be excluded from their coverage, the Court implies that Congress, in its discretion, could expressly include such defendants.

More recently, a separate due process defense for a defendant who was caught as a result of government involvement in the crime has been recognized in the federal courts<sup>14</sup> and by some of the Supreme

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however, the agent's success was attained by the agent's persistence and by the agent's utilization of the fact that he and the defendant had been in the same army division. Furthermore, the government agent initiated contact with Sorrells even though there was substantial evidence that Sorrells enjoyed a good reputation. After recognizing the entrapment defense, the Court reversed Sorrell's conviction and remanded the case for the jury to consider the defense. 287 U.S. at 452.

<sup>7</sup>See *Hampton v. United States*, 425 U.S. 484, 488-90 (1976) (denying the defendant an entrapment defense due to defendant's predisposition); *United States v. Russell*, 411 U.S. 423, 433 (1973) (stating that the focus of the defense is on the predisposition of the defendant to commit the crime); *Sherman v. United States*, 356 U.S. 369, 376 (1958) (majority declining to reassess the subjective view of entrapment, thereby impliedly reaffirming it).

<sup>8</sup>See 21 AM. JUR. 2d *Criminal Law* § 202 (1981).

<sup>9</sup>*Sorrells v. United States*, 287 U.S. 435, 451 (1932); see also, *Hampton v. United States*, 425 U.S. 484, 492 n.2 (1976) (Powell, J., concurring).

<sup>10</sup>*United States v. Jannotti*, 501 F. Supp. 1182, 1200 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S.Ct. 2906 (1982).

<sup>11</sup>See, e.g., *United States v. Russell*, 411 U.S. 423, 433-34 (1973); *Sorrells v. United States*, 287 U.S. 435, 449 (1932).

<sup>12</sup>*Id.* at 448.

<sup>13</sup>*Id.*

<sup>14</sup>See, e.g., *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States v. West*, 511 F.2d 1083 (3d Cir. 1975); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *United States v. Kelly*, 539 F. Supp. 363 (D.D.C. 1982); *United States v. Batres-*

Court Justices.<sup>15</sup> This defense, based on a constitutional claim, is raised when entrapment is unavailable because the defendant was predisposed, but government participation in the crime had reached an extreme level.<sup>16</sup> In applying this defense, the courts have focused on the level of government involvement. The defendant's predisposition, or lack of predisposition, is not determinative; however, it may be weighed as one factor in assessing the appropriateness of the government conduct.<sup>17</sup> Most courts that have recognized the due process defense have repeated Justice Powell's assertion that "[d]ue process in essence means fundamental fairness."<sup>18</sup> The major obstacle between predisposed defendants and the use of this defense has been discerning at what point government involvement is no longer justified but is, instead, fundamentally unfair.

Both the traditional entrapment defense, which focuses on the defendant's predisposition, and the more novel due process defense, which focuses on whether the government's conduct was fundamentally unfair to the predisposed defendant, have been raised in various ABSCAM cases. Because the subjective test for entrapment continues to be the test adhered to by a majority of the Supreme Court,<sup>19</sup> the due process defense, if formally recognized as a defense at all, would be only a secondary defense limited to the most egregious govern-

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Santolino, 521 F. Supp. 744 (N.D. Cal. 1981); *United States v. Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir. 1982), *cert. denied*, 102 S. Ct. 2906 (1982).

<sup>15</sup>*United States v. Russell*, 411 U.S. 423 (1973). Justice Rehnquist's opinion in *Russell* recognized that a new due process defense may be available as a nonentrapment defense when the government's conduct is sufficiently egregious. *Id.* at 431-32. Although in *Hampton v. United States*, 425 U.S. 484, 490 (1976), Justice Rehnquist repudiated the due process defense in the entrapment situation, the two concurring Justices continued to recognize it. 425 U.S. at 495 (Powell, J., concurring). The three dissenting Justices in *Hampton* also recognized the due process defense. 425 U.S. at 499 (Brennan, J., dissenting). See *infra* notes 29-35 and accompanying text.

<sup>16</sup>*United States v. Russell*, 411 U.S. 423, 431-32 (1973); *United States v. Jannotti*, 673 F.2d 578, 607 (3d Cir.), *cert. denied*, 102 S.Ct. 2906 (1982).

<sup>17</sup>See, e.g., *United States v. Batres-Santolino*, 521 F. Supp. 744, 751 (N.D. Cal. 1981); *People v. Isaacson*, 44 N.Y.2d 511, 521, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978).

<sup>18</sup>*Hampton v. United States*, 425 U.S. 484, 494 n.6 (1976) (Powell, J., concurring).

<sup>19</sup>The dissenting and concurring Justices in *Sorrells*, *Sherman*, *Russell*, and *Hampton* argue for an objective theory of entrapment. The objective test for entrapment focuses primarily on the government's conduct; the defendant's predisposition is not controlling. The inquiry under this minority approach is directed at the effect of the government's conduct on a hypothetical, average person. See 21 AM. JUR. 2d *Criminal Law* § 206 (1981). The similarities between this theory and the due process defense are obvious; both focus on the government's conduct rather than on the defendant's predisposition. In fact, an argument could be made that if the objective theory of entrapment is adopted, the due process defense would be unnecessary. This is true because, almost by definition, any government misconduct serious enough to be called egregious and fundamentally unfair would certainly overcome a hypothetical, average person.

ment involvement. The remaining question is how does one determine when government conduct has reached the egregious level and therefore is fundamentally unfair.

This Note will focus on the entrapment and due process defenses raised by the defendants in the ABSCAM proceedings. This Note will focus primarily on the emergence of the new due process defense and will analyze its potential for ultimate success in the relevant ABSCAM proceedings. Finally, this Note will suggest that ABSCAM presents an opportunity for the United States Supreme Court to clarify the due process defense and to provide the federal courts with some guiding principles for future entrapment-type cases.

## II. DEVELOPMENT OF THE DUE PROCESS DEFENSE IN THE FEDERAL COURTS

### A. *The Supreme Court Dicta*

The due process defense, as it applies to entrapment-type cases, has never been the basis for a Supreme Court reversal and, in fact, its existence thus far has only been recognized by the Court in dicta.<sup>20</sup> Nevertheless, because of the way the Justices aligned themselves in *United States v. Russell*<sup>21</sup> and *Hampton v. United States*,<sup>22</sup> it appears safe to say that the due process defense, as distinct from the entrapment defense, may be recognized by a majority of the Court today in the event of exceedingly egregious government misconduct.<sup>23</sup>

In *Russell*, the Court considered whether the entrapment defense could lie when the defendant was clearly predisposed to criminal activity.<sup>24</sup> A government agent provided a rare chemical necessary

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<sup>20</sup>Justice Rehnquist, for the majority in *Russell*, spoke of a separate due process defense available to even a predisposed defendant when "conduct of law enforcement agents is so outrageous that due process principles" are violated. *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

<sup>21</sup>411 U.S. 423 (1973).

<sup>22</sup>425 U.S. 484 (1976) (plurality opinion).

<sup>23</sup>*Hampton* is the latest word from the Supreme Court concerning the due process defense within an entrapment setting. In *Hampton*, Justice Rehnquist, writing for the majority, retreated from his position in *Russell* which first espoused the defense. See *supra* note 20. Now Justice Rehnquist would not allow a due process defense in an entrapment situation but would only rely on prosecution of the police as the remedy for the government's "illegal activity in concert with a defendant . . ." 425 U.S. at 490. This prompted a separate opinion by Justice Powell, joined by Justice Blackmun, concurring with the majority but leaving open the possibility that a case could arise in which "overinvolvement of Government agents" would justify the due process defense. *Id.* at 493. When the dissenting votes of Justices Brennan, Stewart, and Marshall, who encourage adoption of the due process defense and the objective view of entrapment, *id.* at 496-97, are added to those of Powell and Blackmun, a bare majority of the Court recognizes the existence of the due process defense when government conduct is deemed to be fundamentally unfair.

<sup>24</sup>411 U.S. at 427.

for the manufacturing of methamphetamine (commonly known as speed) to the defendant, who was already operating an illicit drug laboratory. Applying the subjective view of entrapment, the defendant's conviction was affirmed because the preexisting drug laboratory established the defendant's predisposition to engage in the manufacture and sale of illegal drugs.<sup>25</sup>

Because the Court in *Russell* rejected the defendant's entrapment defense, the Court was forced to rule on the defendant's due process defense, which had been successful in the court below.<sup>26</sup> The Court recognized that a predisposed defendant could succeed with a due process defense when the government's conduct was sufficiently outrageous, even though a traditional entrapment defense could not lie.<sup>27</sup> Because the government agent's actions in *Russell* were "distinctly not of that [outrageous] breed,"<sup>28</sup> the language espousing the due process defense was reduced to dictum.

The defendant in *Hampton v. United States*<sup>29</sup> was convicted for selling heroin that he had purchased from a government agent. The Supreme Court again used the subjective test for entrapment and affirmed the defendant's conviction because the defendant conceded his predisposition to sell drugs.<sup>30</sup> As in *Russell*, once the defendant's predisposition denied him the entrapment defense, the Court considered the due process defense. Justice Rehnquist, delivering the plurality opinion of the Court, joined by Chief Justice Burger and Justice White, retreated from the *Russell* dictum that recognized a due process defense.<sup>31</sup> Rather than serving as a defense for a predisposed defendant, Justice Rehnquist viewed the proper remedy for outrageous government involvement to be prosecution of the government agents for their "illegal activity in concert with a defendant."<sup>32</sup> The two concurring<sup>33</sup> and three dissenting<sup>34</sup> Justices in *Hampton* disagreed with Justice Rehnquist on this point, recognizing that in cases of extreme governmental misconduct, the due process defense may be asserted, regardless of the defendant's criminal predisposition. The due process defense failed in *Hampton* because, although the two

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<sup>25</sup>*Id.* at 436.

<sup>26</sup>*United States v. Russell*, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973). The Ninth Circuit held that "an intolerable degree of governmental participation" existed. 459 F.2d at 673.

<sup>27</sup>411 U.S. at 431-32.

<sup>28</sup>*Id.* at 432.

<sup>29</sup>425 U.S. 484 (1976) (plurality opinion).

<sup>30</sup>*Id.* at 490.

<sup>31</sup>*Id.* at 489-90.

<sup>32</sup>*Id.* at 490.

<sup>33</sup>*Id.* at 491 (Powell, J., concurring) (joined by Justice Blackmun).

<sup>34</sup>*Id.* at 495 (Brennan, J., dissenting) (joined by Justices Stewart and Marshall).

concurring Justices recognized the defense, they did not find the government's conduct in this case to be sufficiently outrageous.<sup>35</sup> However, in *Hampton*, five Justices recognized that a separate due process defense may be valid when the defendant is predisposed but the government's conduct is outrageous.

The dicta in *Russell* and *Hampton* reveal no clear standards to be used in assessing the merits of a due process defense. According to the majority in *Russell*, the government's misconduct must violate that "'fundamental fairness, shocking to the universal sense of justice,'" standard mandated by the due process clause.<sup>36</sup> However, in *Hampton*, Justice Rehnquist maintained that a breach of the above standard would not serve as a defense but would support the prosecution of the government agents.<sup>37</sup> Justice Powell, concurring in *Hampton*, stated that a due process defense should lie when the defendant is not treated by the government with "fundamental fairness."<sup>38</sup> In *Rochin v. California*,<sup>39</sup> a nonentrapment case cited frequently as an example of government misconduct violative of due process, the Court stated that the rights at stake are those "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"<sup>40</sup> According to *Rochin*, the standard for allowable government conduct was to be set by the "community sense of fair play and decency"<sup>41</sup> in order to determine what conduct may be said to "brutalize the temper of society."<sup>42</sup> These vague standards are of limited utility to a federal court trying to follow precedent.

Because of the lack of any useful Supreme Court guidelines in this area, the only real significance of *Russell* and *Hampton*, with regard to the due process defense, is that they illustrate a probable acceptance of the defense by a majority of the Supreme Court Justices. Because a majority of Justices in *Hampton* did not think that the government's involvement was outrageous, the nature of the due process defense was not fully explained. That responsibility has largely fallen on the lower federal courts. These courts have recognized the due process defense in numerous decisions; however, the decisions

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<sup>35</sup>*Id.* at 491 (Powell, J., concurring).

<sup>36</sup>411 U.S. at 432 (quoting *Kinsella v. United States*, 361 U.S. 234, 246 (1960)). In pertinent part, the fifth amendment provides that "[n]o person shall be . . . deprived of life, liberty or property without due process of law . . . ." U.S. CONST. amend. V.

<sup>37</sup>425 U.S. at 490.

<sup>38</sup>*Id.* at 494 n.6 (Powell, J., concurring).

<sup>39</sup>342 U.S. 165 (1952) (the infamous stomach pumping case).

<sup>40</sup>*Id.* at 169 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

<sup>41</sup>342 U.S. at 173.

<sup>42</sup>*Id.* at 174.

in which the defense has been successful are few.<sup>43</sup> In order to obtain a better grasp on what standards are being used to evaluate the due process defense, the few cases that have based an acquittal or reversal on these grounds will be examined.

*B. Due Process Defense in the Federal Courts*

In *Greene v. United States*,<sup>44</sup> the Court of Appeals for the Ninth Circuit reversed the defendants' convictions for bootlegging because of extreme government involvement in the defendants' bootlegging ventures.<sup>45</sup> This extreme involvement consisted of a government agent who not only provided the defendants with the necessary sugar, but also located a site for the still and offered to provide a still operator. Although the defendants' predisposition, as evidenced by their past involvement in maintaining illegal stills, automatically denied them an entrapment defense,<sup>46</sup> their predisposition did not prevent the court from recognizing a due process defense without expressly labeling it as such.<sup>47</sup> The court emphasized that it was reversing the convictions because the "Government's conduct [rose] to a level of 'creative activity' . . . substantially more intense and aggressive than the level of such activity charged against the Government in numerous [other] entrapment cases . . . ."<sup>48</sup> Even the dissent recognized that "[t]here may some day be a case where . . . government control is so pervasive as to render the crime in its entirety a governmental enterprise and where, on grounds other than entrapment, immunity should be extended to the criminal participants."<sup>49</sup>

Although the Court of Appeals for the Second Circuit in *United States v. Archer*<sup>50</sup> balked at the opportunity to apply the due process defense, the court might have applied the due process defense had

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<sup>43</sup>The decisions in which the due process defense has been successful are *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States v. West*, 511 F.2d 1083 (3d Cir. 1975); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *United States v. Kelly*, 539 F. Supp. 363 (D.D.C. 1982); *United States v. Batres-Santolino*, 521 F. Supp. 744 (N.D. Cal. 1981); *United States v. Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

<sup>44</sup>454 F.2d 783 (9th Cir. 1971). Justice Powell cited *Greene* with approval in *Hampton*, 425 U.S. 484, 493 & n.3 (1976).

<sup>45</sup>454 F.2d at 787.

<sup>46</sup>*Id.* at 786.

<sup>47</sup>The court stated, "We do not believe the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operation, and yet prosecute its collaborators." *Id.* at 787.

<sup>48</sup>*Id.* (quoting *Sherman v. United States*, 356 U.S. 369, 372 (1958)).

<sup>49</sup>454 F.2d at 788. (Merrill, J., dissenting).

<sup>50</sup>486 F.2d 670 (2d Cir. 1973). Justice Powell cited *Archer* with approval in *Hampton*, 425 U.S. at 493 & n.4.

a jurisdictional escape hatch not allowed them to dodge the substantive issue.<sup>51</sup> The court was especially critical of the government's scheme which entailed a staged arrest and bribe offers in an effort to uncover corruption in New York's criminal justice system.<sup>52</sup> Adding to the court's condemnation of the government's conduct was the fact that the *Archer* scheme was directed at unknown corrupt officials rather than targeted suspects.<sup>53</sup>

In *United States v. West*,<sup>54</sup> the Court of Appeals for the Third Circuit reversed the defendant's conviction for unlawful distribution of heroin because government agents were on *both* sides of the drug transaction. In *West*, the informer supplied the defendant with the drugs, and the government agent, as prearranged with the informer, bought the drugs from the defendant after the defendant was persuaded to sell the drugs by the informer. Judge Hastie, writing for the majority, held that "the role of government has passed the point of toleration. Moreover, such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective."<sup>55</sup> Although the per se rule of *West*, stating that due process is violated when government agents are on both sides of a drug transaction, was impliedly rejected in *Hampton*,<sup>56</sup> *West* has never been expressly overruled and still stands for the proposition that a due process defense may be available to a defendant when the government engages in "intolerable conduct."<sup>57</sup> Although, as stated, there are no per se rules, it appears that when the government convicts a defendant for selling narcotics, the fact that government agents assisted in the sale by supplying the drugs and acting as the defendant's partner will place such assistance somewhere near the outrageous level.

*United States v. Twigg*<sup>58</sup> is the first case since *Hampton* in which a federal court of appeals reversed a defendant's conviction by applying the due process defense. In *Twigg*, the government initiated contact with the defendant and prompted him to set up a laboratory to

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<sup>51</sup>Judge Friendly stated, "We are not sure how we would decide this question if decision were required . . . [T]here is certainly a limit to allowing governmental involvement in crime." 486 F.2d at 676 (footnote omitted).

<sup>52</sup>*Id.* at 672-73.

<sup>53</sup>*Id.*

<sup>54</sup>511 F.2d 1083 (3d Cir. 1975).

<sup>55</sup>*Id.* at 1085. See also *United States v. Bueno*, 447 F.2d 903, 905-06 (5th Cir. 1971) (entrapment as a matter of law exists when government supplies and then buys drugs from defendant), *cert. denied*, 411 U.S. 949 (1973).

<sup>56</sup>The Supreme Court affirmed the defendant's conviction even though the government occupied the roles of both seller and buyer, with defendant as the middleman. 425 U.S. at 484.

<sup>57</sup>511 F.2d at 1086.

<sup>58</sup>588 F.2d 373 (3d Cir. 1978).

manufacture drugs. The government's Drug Enforcement Agency (DEA) provided substantial assistance through a government informer. The court reversed the defendant's conviction because it found that the degree of DEA involvement with the criminal enterprise was so outrageous that due process principles foreclosed any prosecution.<sup>59</sup> Although *Twigg* seems to hold that the government violates due process when it instigates a crime without any probable cause to believe that the defendant is already involved in criminal activity, an overwhelming majority of federal courts reach a contrary result.<sup>60</sup> Therefore, *Twigg* remains valid authority only for the narrower holding that due process is violated when the government instigates a crime without probable cause *and* provides extensive assistance to the criminal to complete the crime.<sup>61</sup> Because the probable cause factor has been discounted in this area, the emphasis is obviously on whether the government's participation rose to the level of outrageous assistance.

A more recent case recognizing and applying the due process defense is *United States v. Batres-Santolino*.<sup>62</sup> Thomas, a government informer, succeeded in inducing the defendants to enter into a cocaine transaction even though the defendants had no prior history of dealing in drugs. Although these facts demonstrated the defendants' lack of predisposition to traffic in drugs and seemingly would support an entrapment defense, the defendants chose to rely only on the due process defense. Thus, the availability of the defendants' defense was determined by the judge because the due process defense, in contrast to the entrapment defense, raises a question of law for the court.<sup>63</sup>

The court in *Batres-Santolino* recognized that the due process defense is separate from any entrapment issue and that a defendant's predisposition will not foreclose the success of a due process defense.<sup>64</sup> Although the focus of the due process defense is on the government's conduct, the court held that a defendant's lack of prior

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<sup>59</sup>*Id.* at 377.

<sup>60</sup>*See, e.g.,* *United States v. Swets*, 563 F.2d 989, 991 (10th Cir. 1977) (no showing of probable cause necessary before government can instigate a crime); *United States v. Martinez*, 488 F.2d 1088, 1089 (9th Cir. 1973) (government need not establish that it had knowledge of defendant's propensity toward crime); *United States v. Jenkins*, 480 F.2d 1198, 1200 (5th Cir.) (willingness by defendant to participate in crime can establish predisposition and no probable cause necessary), *cert. denied*, 414 U.S. 913 (1973); *United States v. Rodrigues*, 433 F.2d 760, 762 (1st Cir. 1970) (police would be unable to trap the first offender if probable cause was required before defendant could be tested), *cert. denied*, 401 U.S. 943 (1971).

<sup>61</sup>588 F.2d at 377-78. *See generally* Comment, *Due Process Defense When Government Agents Instigate and Abet Crime*, 67 GEO. L.J. 1455 (1979).

<sup>62</sup>521 F. Supp. 744 (N.D. Cal. 1981).

<sup>63</sup>*Id.* at 750.

<sup>64</sup>*Id.*

criminal involvement was a relevant factor to weigh in determining whether the government conduct is outrageous.<sup>65</sup> In acquitting the defendants, the court held that this was a case "in which government agents 'manufactured' a crime that . . . could not and would not have been committed."<sup>66</sup> The court relied on the fact that defendant had no previous history of drug related crimes *and* on the fact that the government supplied all of the drugs.<sup>67</sup> This case stands for the proposition that if a crime would not have occurred, or would not have been likely to occur *but for* the government's prodding *and* aid, the due process defense may be successful. Because the due process defense is available also to predisposed defendants who fail to meet the "but for" test, the degree of government aid to the defendant is obviously a weightier concern.

What guiding principles can be discerned from these and other opinions to aid a federal court faced with a cognizable due process defense when a defendant's predisposition denies him the entrapment defense? Unfortunately, the only clear principle on which the courts seem to agree is that because covert crime demands extensive government infiltration into the ranks of criminals, situations where government conduct is sufficiently outrageous to violate due process will be extremely rare.<sup>68</sup> The reluctance of the federal courts to utilize the due process defense is furthered by the absence of any Supreme Court standards in this area. Beyond the bench mark case of *Rochin* and its subjective inquiries into "fair play and decency"<sup>69</sup> and "conduct that shocks the conscience,"<sup>70</sup> there have been only meager attempts to establish any concrete standards. Additionally, any extensive reliance on *Rochin* for guidance in this area would be precarious because that case did not arise in an entrapment-type setting.

Nevertheless, by surveying the major cases in this area, common factors emerge as being relevant to the due process defense. Some of these factors were set forth in a New York Court of Appeals decision overturning a conviction because of a successful due process defense.<sup>71</sup> The factors were: (1) whether the crime would not have oc-

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<sup>65</sup>*Id.* at 751.

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 752 (citing *Twigg* as authority for an acquittal when these two factors exist).

<sup>68</sup>*See* *Hampton v. United States*, 425 U.S. 484, 495-96 n.7 (1976) (Powell, J., concurring); *United States v. Russell*, 411 U.S. 423, 432 (1973).

<sup>69</sup>342 U.S. at 173.

<sup>70</sup>*Id.* at 172.

<sup>71</sup>*People v. Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978) (defendant with no prior convictions was induced to sell cocaine by a government informant who only cooperated with police after he was threatened, beaten, and deceived). *See generally* O'Connor, *Entrapment Versus Due Process: A Solution to the Problem of the Criminal Conviction Obtained by Law Enforcement Misconduct*, 7 *FORDHAM URB. L.J.* 35 (1978) (suggesting the *Isaacson* approach to the due process defense is proper and should be adopted by the Supreme Court).

curred but for the government's assistance in manufacturing the crime or whether the defendants were already involved in ongoing criminal activity; (2) whether the government agents committed crimes or otherwise acted improperly; (3) whether the government agents persisted with their inducements to overcome the defendant's reluctance to commit the crime; and (4) whether the government agents' sole motive was to obtain a conviction or to protect the public by preventing further crime.<sup>72</sup>

The federal cases discussed above either impliedly or expressly recognized these factors as relevant to, if not dispositive of, the due process issue. If the more obvious factors of the need for the particular undercover work as determined by the type of crime being investigated<sup>73</sup> and the availability of other, less repugnant, means to combat the criminal activity are added to the factors espoused by the New York Court of Appeals, a hazy set of guidelines emerges to identify the circumstances where the Supreme Court's standard of "fundamental fairness" espoused in the *Russell* and *Hampton* dicta would be violated.<sup>74</sup> A resolution of the issues presented by all of these guidelines was made in favor of two ABSCAM defendants who raised the due process defense at the district court level.<sup>75</sup> The appropriateness of those decisions will be discussed below.

### III. ABSCAM

#### A. Summary of FBI's Scheme

ABSCAM, short for "Abdul Enterprises" and "scam," is a code word used by the FBI to denote an elaborate undercover "sting" operation aimed, in part, at ferreting out corrupt public officials.<sup>76</sup> Although

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<sup>72</sup>*People v. Isaacson*, 44 N.Y.2d 511, 521, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978).

<sup>73</sup>For example, narcotic offenses and official corruption could hardly be detected without clandestine operations by the government.

<sup>74</sup>425 U.S. at 494 n.6 (Powell, J., concurring). Although the majority opinion in *Hampton* held that only a prosecution against the government could lie where a "protected right" of the defendant was violated, for example a specific provision of one of the Bill of Rights, *id.* at 490, a majority of the Supreme Court Justices would recognize the due process defense and probably apply it beyond specific constitutional violations to include the broader notion of infringements in violation of "fundamental fairness." See *supra* note 23 and accompanying text. This is the desirable approach because if the due process defense is only applicable to specific violations of the Constitution, it will amount to only a redundant overlap with the particular constitutional safeguards.

<sup>75</sup>*United States v. Kelly*, 539 F. Supp. 363 (D.D.C. 1982); *United States v. Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

<sup>76</sup>See *United States v. Myers*, 527 F. Supp. 1206 (E.D.N.Y. 1981) for an in-depth factual description of ABSCAM.

the initial purpose of the scheme was to discover stolen and forged securities and stolen art work, the FBI agents ultimately developed a complex and extensive subpart aimed at exposing political corruption.

Through the services of Melvin Weinberg, a racketeer who received probation and a salary for his cooperation, the word was spread to the underworld that wealthy Arabs had large sums of cash to invest in American outlets. "He would pass the word of big money available for deals to other con men . . . . If criminal proposals appeared, appropriate action would be taken by the FBI."<sup>77</sup> Weinberg, together with several FBI agents, posed as representatives for the fictitious Arab corporation, establishing the business in Holbrook, Long Island. By way of unwary and corrupt middlemen who received commissions for providing the undercover agents with public officials interested in the Arab money, several public officials, including six members of the House of Representatives, one United States Senator, one immigration official, one mayor, and two members of the Philadelphia City Council were indicted.<sup>78</sup> Although the facts alleged in each indictment varied, each defendant was recorded and filmed accepting money at the insistence of the undercover agent in return for some political favor concerning investment activities and/or immigration difficulties. It should be noted that Weinberg, the racketeer who aided the government agents, was responsible for inventing this subpart of ABSCAM, which is commonly referred to as the "asylum scenario."<sup>79</sup>

### *B. Failure of the Entrapment and Due Process Defenses*

1. *United States v. Myers*.—In *United States v. Myers*,<sup>80</sup> the defense of entrapment was unavailable to the eight defendants either because it had not been raised at trial and was therefore waived, or because the jury had sufficient evidence to find predisposition.<sup>81</sup> Thus,

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<sup>77</sup>*Id.* at 1210.

<sup>78</sup>*Id.* at 1210-11.

<sup>79</sup>See *United States v. Kelly*, 539 F. Supp. 363, 366 (D.D.C. 1982).

<sup>80</sup>510 F. Supp. 319 (E.D.N.Y.), *aff'd*, 635 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980), *motions denied*, 527 F. Supp. 1206 (E.D.N.Y. 1981), *aff'd*, 692 F.2d 823 (2d Cir. 1982).

<sup>81</sup>527 F. Supp. at 1224. It would be a difficult task to rebut a finding of predisposition when the defendants were all filmed voluntarily taking the cash. This is because evidence of a defendant's ready acquiescence to commit the crime can be used to show his predisposition. *United States v. Jannotti*, 501 F. Supp. 1182, 1200 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S.Ct. 2906 (1982). All of the defendants in *Myers* filed joint briefs in support of basically the same legal principles and were therefore treated as a group. Along with Michael Myers (United States Congressman), named defendants included Angelo Errichetti (Mayor of Camden, New Jersey and New Jersey State Senator), Howard Criden (Philadelphia attorney),

the defendants were left with only one viable defense: outrageous government conduct amounting to a violation of due process. The defendants based this defense on the following claims: (1) ABSCAM manufactured crimes that would never have occurred otherwise; (2) the entire scheme was filled with instances of misconduct ranging from inadequate documentation to a reward system; (3) the inducements offered were overwhelming; (4) the government had no probable cause before it began the scheme; (5) the government used high pressure tactics after a defendant expressed an unwillingness to take a bribe; and (6) the scheme violated principles emanating from the separation of powers doctrine.<sup>82</sup>

Although the District Court for the Eastern District of New York recognized that a due process defense may be available to even a predisposed defendant, it did not find the government's conduct to be sufficiently outrageous.<sup>83</sup> The court held that the "mere instigation of crime does not render law enforcement activity 'outrageous.'"<sup>84</sup> The court emphasized that the government's conduct was less outrageous than in *Hampton* and that the defendants could simply have said "no" to the bribes.<sup>85</sup> The court rejected each basis put forth by the defendants in support of their due process defense in spite of the almost certain fact that no crime would have been committed *but for* the government's instigation of the crime. It was undisputed that none of the defendants were under suspicion prior to their meetings with the undercover agents and that there was no evidence of criminal inclinations or a predisposition to accept bribes except for the filmed ABSCAM payoffs.<sup>86</sup>

In light of the facts which have supported a successful due process defense in the few available cases,<sup>87</sup> the decision reached in *Myers* was appropriate. The defense has only been successful in rare in-

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Louis Johanson (Philadelphia attorney and city council member), Frank Thompson, Jr. (United States Congressman), John Murphy (United States Congressman), Joseph Silvetri (New Jersey businessman), and Raymond Lederer (United States Congressman).

<sup>82</sup>527 F. Supp. at 1217-19.

<sup>83</sup>*Id.* at 1225.

<sup>84</sup>*Id.*

<sup>85</sup>*Id.* Three other legislators, faced with similar offers, rejected the offers and refused to accept the money.

<sup>86</sup>The Court of Appeals for the Second Circuit recently affirmed the defendants' convictions in spite of the alleged due process violations. *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982). The court recognized that the government had no probable cause to believe the defendants were corrupt; the purpose of the scheme was simply to "see who showed up to take the bribes and videotape them in the act of doing so." *Id.* at 837. The court noted that the defendants "enjoy no special constitutional rule that requires prior suspicion of criminal activity before they may be confronted with a governmentally created opportunity to commit a crime." *Id.* at 835.

<sup>87</sup>*See, e.g., United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978).

stances in which the courts found it necessary to "restrain law enforcement activities that involve coercion or outrageous violation of physical integrity."<sup>88</sup> Narcotic crimes, by their nature, offer the potential for much greater police coercion than do crimes of official corruption. The defense has been successful almost exclusively in narcotic cases<sup>89</sup> where police officers went beyond making mere offers and actually assisted the defendant in committing the crime. Because the due process defense is a function of the *level* of government conduct, any distinction between government involvement in crimes of narcotics and crimes of corruption will be only a matter of degree. Nevertheless, a material distinction exists between waving money in the face of a public official and providing knowledge, materials, assistance, purchasers, and drugs for the drug trafficker. In both cases the government is involved; however, only in the latter case has this involvement turned to what might be called outrageous assistance. Another distinction between crimes involving bribery and contraband may be that the courts simply set higher standards for elected officials and demand that they not give in to temptations that may affect their governmental duties.

2. *United States v. Alexandro*.—In *United States v. Alexandro*,<sup>90</sup> an immigration official was convicted for accepting a bribe from undercover agents in exchange for the immigration official's assistance in obtaining an immigration pass. The evidence indicated that Alexandro constructed the scheme and presented it to the undercover agents.<sup>91</sup> Alexandro did not raise the entrapment defense but instead relied on the due process defense.<sup>92</sup> The court rejected the defense under this factual setting but proffered the following test: "The line between lawful subterfuge and excessive Government involvement in violation of the due process clause of the Constitution is drawn when the end sought cannot be justified by the means used."<sup>93</sup> Using its own formula, the court weighed the importance of ferreting out corrupt public officials (the end) and the impotence of conventional police tactics to accomplish the same, with the tactics utilized in the elaborate

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<sup>88</sup>692 F.2d at 837 (2d Cir. 1982) (citations omitted).

<sup>89</sup>See *supra* notes 44-49, 54-67 and accompanying text.

<sup>90</sup>675 F.2d 34 (2d Cir. 1982).

<sup>91</sup>In a separate trial, Alfred Carpentier, a Long Island businessman, was also convicted for his role in initiating contact with the government agents and assuring them that an immigration pass could easily, and illegally, be obtained. On appeal, Carpentier raised the due process defense; however, the Second Circuit found the claim to be meritless. *United States v. Carpentier*, 689 F.2d 21 (2d Cir. 1982).

<sup>92</sup>Alexandro argued that the government's fictitious immigration ploy was "so repugnant and excessive that due process principles should have prohibited his criminal prosecution." 675 F.2d at 39.

<sup>93</sup>*Id.* at 34-35.

government scheme (the means). The court concluded that the defendant had not been treated unfairly.<sup>94</sup>

*Alexandro* represents the easy case where a due process defense has almost no chance for success. In that case, Alexandro created the plot and presented it to the undercover agents. To assure the agents of his ability to obtain a fraudulent passport, Alexandro boasted of his past success in securing passports. The few cases that have upheld acquittals based on the due process defense involved government schemes presented to the defendants.<sup>95</sup> The defendants in *Greene* and *Twigg*, for example, would not have succeeded with the due process defense had they approached undercover agents and proposed plans to sell contraband.

3. *United States v. Williams*.—In *United States v. Williams*,<sup>96</sup> Senator Harrison A. Williams was found guilty of bribery, criminal gratuity, conflict of interest, interstate travel for unlawful activity, and conspiracy.<sup>97</sup> Although the defendants, Williams and Feinberg, relied on the defense of entrapment, the jury found that they were both predisposed to commit acts of corruption.<sup>98</sup> After their convictions for taking bribes, the defendants moved to have the jury verdicts set aside based on the government's outrageous conduct amounting to violations of due process. As a basis for this defense, the defendants pointed to the pressure applied by the agents,<sup>99</sup> the selectivity of the prosecutions, the size of the inducements, and other miscellaneous instances of claimed outrageousness.<sup>100</sup> In spite of these allegations of government misconduct, the court found that the defendants knowingly and voluntarily entered into an illegal course of conduct aimed at using Senator Williams' political influence and power to obtain

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<sup>94</sup>*Id.* at 42.

<sup>95</sup>*See, e.g., United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978) (government initiated contact and proposed that defendant set up drug laboratory); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971) (government proposed illegal still operation).

<sup>96</sup>529 F. Supp. 1085 (E.D.N.Y. 1981).

<sup>97</sup>Senator Williams held a secret interest in a titanium mine and was interested in acquiring financial investments from the Arabs to support the venture. It was conceded that this, on its face, would have been a perfectly legitimate relationship. However, "[c]riminality arose out of the promise requested by the undercover agent as a condition for the financing, which was that defendant Williams would promise to use his power and influence as a United States Senator to obtain government contracts for purchasing the titanium to be produced by the mine . . . ." *Id.* at 1090-91.

<sup>98</sup>*Id.* at 1088. Various pieces of circumstantial evidence, such as Williams' contacts with corrupt politicians, allowed the jury to find predisposition.

<sup>99</sup>This refers to the episode now referred to as the "coaching incident" in which government agents "coached" Williams on how to conduct himself in front of the fictitious Arab sheik, who was also a government agent.

<sup>100</sup>The miscellaneous instances of allegedly outrageous conduct included various forgeries made to further the apparent legitimacy of "Abdul Enterprises" and the use of Weinberg, a reknowned hoodlum, as a government agent. 529 F. Supp. at 1102.

government contracts for the purchase of titanium.<sup>101</sup> The court considered the degree of sophistication expected from any United States Senator and concluded that the evidence of government misconduct was not sufficient to meet the outrageous conduct and fundamental fairness standards mentioned in the *Russell and Hampton* dicta.<sup>102</sup>

There is one fact that distinguishes *Williams* from the other ABSCAM cases. Senator Williams had an additional motive for taking a bribe: he owned an interest in the same mine which the bribes were intended to benefit. Although this fact alone does not necessarily suggest anything improper, the court obviously afforded due weight to it in considering Williams' entrapment and due process claims. To accept Williams' claim that the government's conduct was outrageous, the court would have had to believe that Williams thought it a mere coincidence that the agents wanted to buy his influence in securing titanium contracts for a mine which Williams partially owned. Given Williams' experience and sophistication, the inference is overwhelming that he either accepted the bribes to promote his vested interest in the mine or to profit from the money alone, or for both reasons.

*Williams* is unlike the federal cases previously discussed which involved narcotics and police officers who took advantage of the defendant's lack of sophistication and assisted in committing the crimes.<sup>103</sup> No government agent assisted Williams in taking the money; only opportunities were presented.

### C. Success of the Due Process Defense

1. *United States v. Jannotti*.—*United States v. Jannotti*<sup>104</sup> grew out of the Philadelphia phase of ABSCAM that began in 1980 when Weinberg, through intermediaries, began spreading the word that Abdul Enterprises planned to invest 150 million dollars for a hotel in the city. The government agents, posing as representatives of the fictitious sheik, purported to be concerned that local laws and regulations might slow up the hotel project. To eliminate these concerns, the government agents, through unwary middlemen, sought to gain assurances from local politicians that any ensuing difficulties could be solved quickly and without resort to the slow processes of local government. Jannotti and Schwartz, who were members of Philadelphia's city council, were lured by the potential investments into meeting with the undercover agents. The money to be paid to Schwartz was characterized as a consulting fee for his expert advice on the intricacies of local government.

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<sup>101</sup>*Id.* at 1107.

<sup>102</sup>*Id.* at 1099.

<sup>103</sup>See *supra* notes 44-49, 54-67 and accompanying text.

<sup>104</sup>501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

Although Schwartz and Jannotti attended separate meetings with the fictitious investors, the government agents explained, in both meetings, that the hotel project would be completely legitimate but that the sheik's "way of doing business" was to acquire politicians as "friends."<sup>105</sup> In other words, the Arabs were accustomed to paying cash in exchange for political support even when the project would be legitimate. Both Schwartz and Jannotti initially refused to accept any money for their support of the project because, as both stated, they were always interested in legitimate projects that would improve their city, and because the new jobs and added tax dollars from such a project merited their support.

Nevertheless, the agents insisted on assurances from the defendants and stressed the fact that without the assurances "their principals would be unwilling to proceed with the project in Philadelphia."<sup>106</sup> Despite the foregoing evidence tending to establish that the defendants were prodded into accepting bribes, the filmed evidence of each accepting cash from the agents illustrated their ready acquiescence to partake in the crime and the jury found them both to be predisposed and therefore guilty.<sup>107</sup>

Judge Fullam of the District Court for the Eastern District of Pennsylvania granted the defendants' motions to set aside the jury verdict.<sup>108</sup> This decision was based on several alternative grounds, two of which were entrapment as a matter of law and governmental misconduct amounting to a due process violation.<sup>109</sup> Judge Fullam found that there was no evidence upon which a reasonable jury could conclude that the defendants were predisposed; therefore, given the government's inducements, Judge Fullam held that entrapment was established as a matter of law.<sup>110</sup>

This holding was not only unnecessary in light of the alternative grounds given for acquittal, but as was subsequently pointed out by the Court of Appeals for the Third Circuit, it was also improper.<sup>111</sup> The ABSCAM cases are unique in that nearly all of the incriminating evidence was displayed on film for the jury to witness the actual commission of the alleged criminal acts. A judge takes a bold step when he usurps the function of a jury, especially when the credibility of witnesses is an issue as in *Jannotti*.<sup>112</sup> Judge Fullam admitted that a defendant's ready acquiescence in the crime can be sufficient proof of his predisposition, but held that an acceptance of the money in

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<sup>105</sup>501 F. Supp. at 1194, 1196, 1199.

<sup>106</sup>*Id.* at 1200.

<sup>107</sup>*Id.* at 1198-99.

<sup>108</sup>*Id.* at 1205.

<sup>109</sup>*Id.*

<sup>110</sup>*Id.* at 1200.

<sup>111</sup>*United States v. Jannotti*, 673 F.2d 578, 580 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

<sup>112</sup>673 F.2d at 598-602.

this case did not constitute such ready acquiescence.<sup>113</sup> However, because entrapment is almost always a jury issue<sup>114</sup> and the jury in this case was actually able to witness the defendants' actions, the court erred in finding entrapment as a matter of law. Once the films were viewed and the defendants were seen taking the money, the primary issue became whether the defendants' testimony as to a lack of predisposition was believable. In its reversal, the majority opinion of the Third Circuit correctly pointed out that credibility determinations are classically within the province of the jury.<sup>115</sup>

In spite of the reversal by the Third Circuit, the district court opinion in *Jannotti* is important for its alternative holding that the tactics used in ABSCAM violated the due process rights of the defendants.<sup>116</sup> After recognizing that a majority of the Supreme Court has left open the possibility for a due process defense even when the defendant is predisposed, Judge Fullam went on to discuss his reasons for applying the defense. He correctly considered as relevant factors the nature of the crime and the available means necessary to thwart the crime. Relying on *United States v. Twigg*,<sup>117</sup> Judge Fullam held that "[w]hile municipal bribery may be 'fleeting' and 'elusive,' so that governmental subterfuge and even creative involvement may be necessary to combat it, the techniques involved here went far beyond the necessities of legitimate law enforcement."<sup>118</sup> Specifically, Judge Fullam held that the extremely generous bribes coupled with the threat that Philadelphia would lose the project unless the money were accepted amounted to such extreme misconduct by the government that due process was violated.<sup>119</sup>

Judge Fullam's opinion reads more like a legislative declaration of policy than a judicial inquiry into the available precedents. Specifically, Judge Fullam stated that "it is neither necessary nor appropriate" for government agents to engage in the tactics used in ABSCAM to ferret out corruption<sup>120</sup> and "it is surely not within the legitimate province of federal agents to embark upon a program of corrupting . . . officials, merely to demonstrate that it is possible."<sup>121</sup> While these policy considerations may be relevant to the due process

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<sup>113</sup>501 F. Supp. at 1201.

<sup>114</sup>See *United States v. Lents*, 624 F.2d 1280, 1286 (5th Cir. 1980), *cert. denied*, 450 U.S. 995 (1981); *United States v. Twigg*, 588 F.2d 373, 376 (3d Cir. 1978).

<sup>115</sup>673 F.2d at 598 (citing *United States v. Bocra*, 623 F.2d 281, 289 (3d Cir. 1980)).

<sup>116</sup>501 F. Supp. at 1205.

<sup>117</sup>588 F.2d 373 (3d Cir. 1978).

<sup>118</sup>501 F. Supp. at 1204.

<sup>119</sup>*Id.* Judge Fullam was critical of the ABSCAM tactics directed at Jannotti and Schwartz which he believed were "neither necessary nor appropriate to the task of ferreting out crime . . . ." *Id.*

<sup>120</sup>*Id.*

<sup>121</sup>*Id.* at 1205.

defense, given the facts of *Jannotti*, they alone cannot, and ultimately did not, support a due process defense of constitutional magnitude.

The convictions of Jannotti and Schwartz were reinstated by the Court of Appeals for the Third Circuit.<sup>122</sup> In overturning the district court's finding of entrapment as a matter of law, the appellate court focused on the traditional role of the jury in entrapment cases and held that the function of the jury had been usurped.<sup>123</sup> The court not only concluded that the jury had sufficient evidence of the defendants' predisposition,<sup>124</sup> which was shown by their ready acquiescence to receive the money, but also attacked the district court's bases for finding government inducement.<sup>125</sup>

Because the district court based its entrapment *and* due process holdings largely on its view that the government's inducements were overwhelming,<sup>126</sup> the Third Circuit's contrary finding that the inducements could not even overcome the jury's finding of predisposition, with regard to the entrapment defense, made frivolous the claim that the same inducements could support a due process defense.<sup>127</sup> As the appellate court correctly observed, "the [Supreme] Court has manifestly reserved for the constitutional defense [of due process] only the most intolerable government conduct."<sup>128</sup> However, "[i]f the contours of the entrapment defense are imprecise . . . [a] similar delineation of the conduct circumscribed by the due process defense is, at best, elusive."<sup>129</sup> This statement by the court acknowledges that what amounts to fundamental fairness and outrageous conduct violative of due process is extremely fact sensitive and subject to individual interpretation. What may shock the conscience of some people as being obtrusive government misconduct may be viewed as excellent police work by others. Of course, ambiguities and divergent views exist and will continue to exist in many areas of the law; however, this is no

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<sup>122</sup>673 F.2d 578 (3d Cir. 1982). This is the same circuit which reversed the defendant's conviction in *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), because of a successful due process defense. *Twigg* was interpreted by Judge Fullam of the district court as requiring an acquittal in *Jannotti*. 501 F. Supp. at 1204.

<sup>123</sup>673 F.2d at 608.

<sup>124</sup>*Id.* at 607-08.

<sup>125</sup>*Id.* at 599-604. The district court based its finding that the defendants were induced on the three following factors: (1) the amount of the bribes (\$30,000 for Schwartz and \$10,000 for Jannotti); (2) the court's opinion that the defendants were not being asked to do anything improper; and (3) the threats that the project's location in Philadelphia was contingent upon the defendants accepting the payoffs.

<sup>126</sup>*See supra* note 125 and accompanying text.

<sup>127</sup>The Third Circuit stated that "it is plain from the Court's opinion in *Russell* and the separate opinions in *Hampton*, however, that a successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense." 673 F.2d at 607.

<sup>128</sup>*Id.* at 608.

<sup>129</sup>*Id.* at 606.

reason to relent in the search for predictability and common principles with respect to the application of the due process defense.

Unlike the district court, which seemingly was willing to invoke mere policy grounds for its due process acquittal, the Third Circuit expressly left this function to the executive branch.<sup>130</sup> The Third Circuit took judicial notice of the fact that the crime of bribery, by its nature, requires that the government be allowed to use a wide range of weaponry to combat it. A judicial distaste for the government's conduct, although certainly the starting point for a successful due process defense, is simply insufficient in itself to sustain an application of the due process defense. Unless the government's behavior shocks the conscience and violates that elusive concept embodied in the term fundamental fairness, the issue of government misconduct is for the policy makers who must answer to the public.

The dissenting opinion, written by Judge Aldisert, and joined by Judge Weis, primarily criticized the majority's disposition of the entrapment issue.<sup>131</sup> Rather than perceiving the filmed evidence as creating an ideal jury situation, Judge Aldisert argued that, in effect, the films nullified the need for a jury because the films largely eliminated any possibility for controverted facts.<sup>132</sup> When films of the alleged criminal activity are available, and therefore few credibility issues are presented, the dissent submitted that it should be the judge's responsibility, not the jury's, to decide the issue of entrapment.<sup>133</sup> One suspects, however, that Judge Aldisert's real reason for finding no jury issue was his distrust of laymen in deciding issues that he perceived as having great social significance. Judge Aldisert stated that "we are confronting an extremely sensitive intersection between morals and positive law, which demands that the judiciary assume rather than shirk responsibility."<sup>134</sup> Once Judge Aldisert assumed such judicial responsibility, he emphasized that the strength and nature of the government's inducements are very relevant to the

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<sup>130</sup>*Id.* at 609. The court stated that:

Official corruption, in the form of bribery and extortion involving public officials, can, like the narcotics sales involved in *Hampton*, easily elude detection, since both parties to the transaction have an interest in concealment. Indeed, bribery may be even more difficult to uncover than drug deals. A determination of what undercover operations are necessary . . . must be left, in the first instance, to [the executive branch] . . . Unless the behavior of the F.B.I. agents rose to that level of outrageousness which would bar conviction, the conduct of agents . . . is more appropriately considered through the political process where divergent views can be expressed in the ballot box.

*Id.* (citations omitted).

<sup>131</sup>673 F.2d at 612-23 (Aldisert, J., dissenting).

<sup>132</sup>*Id.* at 614.

<sup>133</sup>*Id.* at 623.

<sup>134</sup>*Id.* at 616.

predisposition issue.<sup>135</sup> The stronger the inducements, the more difficult it will be for the government to prove a defendant's predisposition; thus, Judge Aldisert concluded that "[i]t is difficult to conceive of a stronger case of inducement by the government."<sup>136</sup>

That issue—the strength of the inducements—was the reason for the split between the majority and dissent. The majority viewed the offered inducements as relatively insignificant in light of the status enjoyed by the defendants<sup>137</sup> and considered the acceptance of money as consummating a bribe. The dissent agreed with Judge Fullam of the district court, viewing the inducements as being overwhelming and the acceptance of money as only a sign of friendship.<sup>138</sup>

Whether the majority correctly construed the due process defense in *Jannotti* turns largely on whether the due process defense should be expanded beyond the traditional narcotic cases to include crimes of corruption.<sup>139</sup> This expansion would be necessary because the differing nature of the narcotic cases, in terms of the type of criminals involved and the government assistance provided, may render them insufficient as precedents to support the acquittal of defendants like *Jannotti*.

*United States v. Twigg*<sup>140</sup> is representative of the precedents in this area. Although *Twigg* was relied upon by the district court in *Jannotti*, the court of appeals properly distinguished *Twigg*. In *Twigg*, the agent went beyond passive inducements; the agent actually assisted the defendant by providing him with knowledge, money, materials, and a production site for the manufacture of narcotics.<sup>141</sup> In *Jannotti*, the only government involvement was the offering of inducements. *Jannotti* would be more like *Twigg* and the other narcotic cases had the government agents somehow assisted *Jannotti* in receiving the bribes after they were offered. The difficulty in conceptualizing a factual situation in which government agents are able to both induce and help a politician take the bribe makes it doubtful that the

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<sup>135</sup>*Id.* at 617.

<sup>136</sup>*Id.*

<sup>137</sup>See *supra* note 125 and accompanying text (listing the inducements considered by the majority as being insufficient to establish entrapment as a matter of law or a due process defense). See also *United States v. Myers*, 527 F. Supp. 1206, 1245 (E.D.N.Y. 1981) (discussing the district court's disposition of *Jannotti* and criticizing the weight afforded to the various inducements).

<sup>138</sup>673 F.2d at 619.

<sup>139</sup>The issue also turns on one's perception of the roles to be occupied by the judge and jury. While the majority concluded that the jury's function had been usurped, *id.* at 602, the dissent believed that when dealing in areas of the law where "minimal legal thresholds" are absent, "the jury, untrained in the law, should never be called upon to design and construct [those thresholds]." *Id.* at 614 (Aldisert, J., dissenting).

<sup>140</sup>588 F.2d 373 (3d Cir. 1978).

<sup>141</sup>*Id.* at 380-81.

due process defense will ever be extended successfully to crimes of political corruption.<sup>142</sup>

2. *United States v. Kelly*.—*United States v. Kelly*,<sup>143</sup> a 1982 decision, is the only other ABSCAM case in which a district court overturned the jury's conviction and acquitted the defendant. *Kelly* is especially significant because the defendant was acquitted exclusively because of government misconduct resulting in a denial of due process.<sup>144</sup>

The factual setting of *Kelly* is quite similar to that described in the *Jannotti* case. The word was out that rich Arab sheiks had millions of dollars to invest and were interested in meeting public officials who were willing and able to assist with investment and immigration difficulties. Commissions were offered to middlemen for producing government officials whom the Arabs could successfully bribe. Various middlemen<sup>145</sup> notified Kelly of the Arab investment opportunities. One middleman, Eugene Ciuzio, boasted to the undercover agents that he had virtual control over Kelly;<sup>146</sup> consequently, Ciuzio was designated to "feed the program" to the Congressman.<sup>147</sup> It was undisputed that when payments were first suggested, Kelly rejected the idea and expressed interest only in the legitimate aspects of the Arab ventures.<sup>148</sup> At another meeting with the agents, and after Ciuzio had warned the government agents to be very discreet about the subject of payoffs, Kelly refused a second bribe offer. The agents persisted even after Kelly rejected a third bribe offer, and Kelly openly insisted that he was only interested in legitimate projects that could benefit his district.<sup>149</sup> Further persistence and the display of \$25,000 spread out

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<sup>142</sup>The Third Circuit, in *Jannotti*, distinguished *Twigg*, *Hampton*, and other drug-related cases on the grounds that the drug-related cases typically involve situations in which the government participates in both the buying and the selling of the drugs. 673 F.2d at 608.

<sup>143</sup>539 F. Supp. 363 (D.D.C. 1982).

<sup>144</sup>*Id.*

<sup>145</sup>The middlemen involved were Eugene Ciuzio, Stanley Weisz, and William Rosenberg.

<sup>146</sup>There was no evidence to substantiate Ciuzio's assertion that he "controlled" Kelly; consequently, the court refused to permit the jury to consider Ciuzio's assertion. 539 F. Supp. at 367.

<sup>147</sup>*Id.* Part of the "program" consisted of a \$25,000 incentive offer for Kelly that was later increased to \$250,000 by Ciuzio. *Id.* at 366-67.

<sup>148</sup>The legitimate aspects were, of course, the purported investments to be made in Kelly's district that would benefit Kelly's constituents. The requests for help in obtaining immigration passes for the Arabs, and the Arabs' insistence that Kelly be paid for his support of the project are examples of the illegitimate aspects of the proffered arrangement.

<sup>149</sup>The agents later explained that it was their feeling that Kelly was just "being cute" when he rejected the initial bribe offers.

on a table in stacks of one hundred dollar bills finally persuaded Kelly to take the bribe.<sup>150</sup>

Judge Bryant, in overturning the jury's guilty verdict, displayed his own personal bias and repulsion towards the ABSCAM scheme as it affected Kelly.<sup>151</sup> He recognized, however, that personal bias was insufficient as a basis upon which to rest a due process defense and sought to "identify some discernible line between that conduct which arouses my personal resentment, and that which falls short of minimal standards of fairness."<sup>152</sup>

To locate that discernible line and thus arrive at the proper meaning of fundamental fairness, Judge Bryant, citing no authority, stated that the government may not tempt an individual beyond that which he "is likely to encounter in the ordinary course."<sup>153</sup> According to Judge Bryant, it is so unrealistic for a Congressman to receive further bribe offers once the first one has been refused that the agent's persistence in *Kelly* amounted to fundamentally unfair tactics in violation of Kelly's due process rights.<sup>154</sup> Judge Bryant reached this conclusion by determining that, because the bribery statute under which Kelly was convicted also imposes sanctions upon the party offering the bribe,<sup>155</sup> no one besides a government agent who is immune from prosecution would reasonably have made three bribe attempts to Kelly.<sup>156</sup>

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<sup>150</sup>This was the first payment of a \$100,000 bribe.

<sup>151</sup>539 F. Supp. at 373. At an earlier bench conference, Judge Bryant stated that this case "has an odor to it that is going to be cleared away before anybody gets convicted. It has an odor to it that is absolutely repulsive. Let's get along with the trial . . . . But it stinks." *Id.* at 373 n.45.

<sup>152</sup>*Id.* at 373. The fear of this personal bias in the judiciary may be what led Justice Rehnquist to reject the due process defense. He stated in *Hampton* that "[t]he execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." *Hampton v. United States*, 425 U.S. 484, 490 (1976) (quoting *United States v. Russell*, 411 U.S. 423, 435 (1973)).

<sup>153</sup>539 F. Supp. at 374. Judge Bryant explained that "[t]o offer any other type of temptation does not serve the function of preventing crime by apprehending those who, when faced with actual opportunity, would become criminals." *Id.*

<sup>154</sup>*Id.* at 373, 376-77.

<sup>155</sup>18 U.S.C. § 201 (1976) provides in pertinent part that:

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . or offers or promises any public official . . . to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official . . . to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official . . . to do or omit to do any act in violation of his lawful duty . . . [shall be punished in accordance with this statute].

<sup>156</sup>539 F. Supp. at 376.

Judge Bryant reasoned that no one in "real life" would have persisted in offering the bribes because offering bribes is illegal by statute; therefore, to persist in making bribe offers after repeated rejections was fundamentally unfair and violative of Kelly's due process rights.<sup>157</sup> Because only the government would and could persist in such a scheme, so the theory goes, the bribery could never have been committed *but for* the government's involvement.<sup>158</sup> Viewed in this perspective, the government manufactured a crime that never would have otherwise occurred. Judge Bryant explained that when the repeated urgings are likely to be repeated in real life, the issue is for the jury and is only one of inducement and of predisposition within an entrapment context.<sup>159</sup> In contrast, Judge Bryant believed that inducements which are illegal and made repeatedly by government officers whose behavior, therefore, fails to mirror real life, constitutes outrageous conduct, which triggers the due process defense. In support of this proposition, the court cited *United States v. Russell*<sup>160</sup> noting that the actions of the government agent in *Russell* did not violate any federal statute.<sup>161</sup>

Although this area of the law would be simplified if courts adopted Judge Bryant's test for fundamental fairness in deciding the due process issue, his analysis is not likely to receive much judicial support. There are three essential flaws in Judge Bryant's analysis. First, it is erroneous to assume that in real life a person would not persist in offering a bribe because that person has already committed the crime after the first offer is made. It would be a more logical response for a criminal, faced with an uncooperative official, to persist in his bribery attempts because the criminal has potentially nothing more to lose; one bribery attempt is enough to break the law. Judge Bryant supported his position that repeated bribery attempts would be unrealistic by saying that any individual would quit after one bribery attempt "for fear that the Congressman would notify the FBI."<sup>162</sup> The fallacy in this conclusion is made evident by the fact that neither Kelly nor any other official indicted as a result of ABSCAM notified the FBI.

A more serious flaw in Judge Bryant's opinion is his emphasis on the fact that the agents themselves were violating the bribery statute and his apparent reliance on *Russell* for the proposition that this is fundamentally unfair conduct.<sup>163</sup> It is well settled that govern-

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<sup>157</sup>*Id.* at 374, 376.

<sup>158</sup>*Id.* at 377.

<sup>159</sup>*Id.* at 376.

<sup>160</sup>411 U.S. 423 (1973).

<sup>161</sup>539 F. Supp. at 377. See 18 U.S.C. § 201(a)-(c) (1976).

<sup>162</sup>539 F. Supp. at 376.

<sup>163</sup>*Id.* at 377 (citing *United States v. Russell*, 411 U.S. 423, 430 (1973)). Whether the government agents committed crimes themselves in their efforts to trap the

ment agents may participate to a limited degree in criminal conduct to trap unwary criminals.<sup>164</sup> The various narcotic offenses serve as prime examples of situations where government agents, either by selling or by buying drugs, participate in the commission of crimes. Technically, however, the government agents have not committed crimes because the agents act without the requisite mens rea. Because the bribery statute under which Kelly was originally convicted requires an "intent to influence,"<sup>165</sup> which the FBI agents obviously did not have, it is clear that the government agents did not technically violate the statute. The agents were not motivated by a desire to secure political favors for themselves when they offered the bribes. It is that evil which the statute was created to attack and which the agents were trying to expose.

Even if it is agreed, arguendo, that the ABSCAM tactics would not occur in real life situations and that the agents did violate the bribery statute, it is doubtful that this conduct alone violated the due process rights of Congressman Kelly. A defendant's predisposition not only automatically denies him the entrapment defense, but it also weighs against him when relying on the due process defense.<sup>166</sup> Judge Bryant apparently conceded that Kelly was predisposed or, at least, Judge Bryant implied that such a finding would not change his decision.<sup>167</sup> However, in addressing the dispositive role of predisposition in an entrapment defense with such strong language that is suggestive of its influence even on the due process defense, Justice Powell noted in *Hampton* that:

[T]he cases, if any, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses, which are so difficult

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criminals is only one factor to be considered when a due process defense is raised; it alone is not dispositive. See *supra* notes 71-75 and accompanying text. As Justice Rehnquist noted in *Russell*, "law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a *limited participation in their unlawful present practices*. Such infiltration is a recognized and permissible means of investigation . . . ." 411 U.S. at 432 (emphasis added).

<sup>164</sup>411 U.S. at 432. See also *Hampton v. United States*, 425 U.S. 484 (1976) (government "crimes" of selling and buying drugs from the defendant held not sufficient to warrant a reversal of defendant's conviction).

<sup>165</sup>See 18 U.S.C. § 201 (1976).

<sup>166</sup>See, e.g., *United States v. Batres-Santolino*, 521 F. Supp. 744, 751 (N.D. Cal. 1981); *People v. Isaacson*, 44 N.Y.2d 511, 521, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978).

<sup>167</sup>539 F. Supp. at 376-77. Judge Bryant admitted that he was "disappointed and chagrined, . . . at the sight of Kelly stuffing \$100 bills into his pockets." *Id.* at 375.

to detect in the absence of undercover Government involvement.<sup>168</sup>

It would be even more difficult to sustain a due process defense when the defendant is charged with bribery, a crime patently less susceptible to discovery than crimes involving contraband. The federal court decisions sustaining the due process defense<sup>169</sup> and the Supreme Court dicta in *Hampton* and *Russell* recognizing a potential due process defense involved contraband offenses and more direct government involvement in the form of assistance than any of the ABSCAM defendants experienced. Unlike narcotic offenses, crimes of corruption leave behind little concrete evidence; a handshake or facial expression may consummate the crime. Like narcotic offenses, however, undercover operations are necessary to fight against corruption because of the inability to otherwise detect such crimes.

#### IV. ABSCAM'S FUTURE AFTER *JANNOTTI* AND *KELLY*

The critical issue to future litigants is whether the district courts in *Jannotti* and *Kelly* were correct in finding that the actions of the government agents in the ABSCAM operations rendered the crimes, in their entirety, a governmental enterprise where immunity should be extended to the criminal participants on the ground of due process violations. It is submitted that ABSCAM does not represent the "situation in which the conduct of law enforcement agents [was] so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."<sup>170</sup> It would be difficult to justify an expansive use of the due process defense to include the ABSCAM cases unless, or until, the Supreme Court chooses to expand the limited success of this defense and clarify the defense within its fundamental fairness parameters. Those parameters are presently so vague as to defy accurate description and predictability except in the most extreme case.<sup>171</sup>

The ABSCAM cases are simply not instances of extreme governmental misconduct. Unlike the federal precedents in this area, the ABSCAM cases all involved sophisticated politicians, not street

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<sup>168</sup>425 U.S. at 495 n.7 (Powell, J., concurring).

<sup>169</sup>*United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States v. West*, 511 F.2d 1083 (3d Cir. 1975); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *United States v. Batres-Santolino*, 521 F. Supp. 744 (N.D. Cal. 1981). This list of federal district and appellate court decisions lists non-ABSCAM entrapment-type cases where the government's conduct was deemed to be outrageous. All four involved contraband offenses in which the government assumed a criminal role and provided substantial assistance to the defendant.

<sup>170</sup>*United States v. Russell*, 411 U.S. 423, 431-32 (1973).

<sup>171</sup>*See, e.g., Rochin v. California*, 342 U.S. 165 (1952) (the infamous stomach pumping case).

criminals. Far from actually *aiding* the ABSCAM defendants in the commission of crimes, the government agents' participation never exceeded providing opportunities and inducements. This is to be contrasted with the narcotic cases where the government agents assumed the roles of something resembling accomplices.<sup>172</sup> Of course, the mere payment of the money could be construed as aiding the ABSCAM defendants. This however, as a matter of degree, does not approach the level of assistance given in the narcotic cases. The ABSCAM cases would be more like the narcotic cases in which the due process defense has succeeded, if the government agents had assisted the politicians in *receiving* the bribes. Even involvement to this degree, however, may not satisfy the Supreme Court as being "outrageous" enough.<sup>173</sup>

The ABSCAM defendants do have several factors weighing in their favor, which would tend to support a due process defense. Considering the elements held to be relevant in the cases previously discussed,<sup>174</sup> a viable argument may be presented to show that no bribes would have occurred *but for* the government's scheme and that there was some reluctance, at least initially by some of the defendants, in accepting the bribes.<sup>175</sup> It is also largely undisputed that the government had no probable cause for suspecting a particular official of corruption until he was already drawn into the government's scheme.<sup>176</sup> Finally, the inducements offered to the defendants to overcome their reluctance were concededly strong. However, in light of the sophistication of most of the ABSCAM defendants, this factor may be of little persuasive value.<sup>177</sup>

Unfortunately for the ABSCAM defendants, other relevant factors weigh against them. It is undisputed that crimes of corruption require, for their detection, undercover operations run by the government. There are no other less repugnant means to combat this type of criminal activity.<sup>178</sup> Although the wisdom of conducting such an

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<sup>172</sup>See *supra* notes 44-49, 54-67 and accompanying text.

<sup>173</sup>See *Hampton v. United States*, 425 U.S. 484 (1976) (holding that the government's involvement in the crime was not outrageous even though the agent was technically an accomplice).

<sup>174</sup>See *supra* notes 69-75 and accompanying text for the major factors relevant to the due process defense.

<sup>175</sup>*Id.*

<sup>176</sup>*Id.* But see *supra* note 60 and accompanying text.

<sup>177</sup>See *supra* notes 69-75 and accompanying text.

<sup>178</sup>One critic of ABSCAM vented his feelings by stating that, "I think it is bad, evil, illegal, vicious and unconstitutional for officers of the United States to engage in the deliberate manufacture of crimes in the hope that their synthetic crimes will ensnare the bad guys." Gould, *A Defeat for Law and Order*, N.Y.L.J., Feb. 15, 1980, at 3. However, another critic added that:

For many crimes . . . [discovery of the criminals without lures and under-

elaborate scheme may be questioned in terms of a cost-benefit analysis, it is too much to say that the government engaged in improper conduct that is repugnant to a sense of justice and shocking to the conscience.<sup>179</sup> What is shocking to the conscience is the success of ABSCAM in uncovering officials who were willing to accept bribes.

Because the lower courts are in dispute as to what a successful due process defense requires, the Supreme Court should clarify this issue. Since *Hampton*, it appears that several of the Supreme Court Justices would deny the ABSCAM defendant a due process defense.<sup>180</sup> If the Justices who recognize outrageous government misconduct as giving rise to a *defense* limit the defense to specific, constitutional violations, the due process defense certainly would be clarified; however, such a requirement would considerably restrict the scope of the due process defense, making it a redundant defense which would overlap with existing constitutional safeguards.<sup>181</sup> If the defense is given a broader interpretation constrained only by those elusive parameters which connote "fundamental fairness" and "outrageous conduct", little or no guiding principles will exist.

It would seem that the line between government conduct that merely offends our sense of what constitutes efficient police work and government misconduct that is so outrageous that it violates an individual's due process rights should be drawn where the government agents actually assist the defendant in committing the crime. Under this analysis, so long as the government's participation does not exceed passively offering inducements, regardless of how often or strong, the defendant could rely only on the entrapment defense. Of course, the political processes also would be available if the government's tactics were deemed obtrusive or wasteful.

The due process defense should not be available until the government agents go further than passively offering inducements and

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cover activities] is not possible, and bribery of public officials is one such crime. Unlike crimes directed at individual victims . . . crimes of official corruption have no victim save society at large . . . Both briber and bribee are happy with the outcome. If subversion of governmental processes is to be discovered, it must be by undercover activity.

Livermore, *Enforcement Workshop: ABSCAM Entrapment*, 17 CRIM. L. BULL. 69, 72 (1981).

<sup>179</sup>See *supra* notes 69-75 and accompanying text for the major factors relevant to the due process defense.

<sup>180</sup>This is the view adhered to by Justices Rehnquist, White, and Chief Justice Burger. See *Hampton v. United States*, 425 U.S. at 490-91.

<sup>181</sup>For example, "if due process were equivalent to fourth or fifth amendment rights, due process would be superfluous since such rights are already constitutionally protected." O'Connor, *Entrapment Versus Due Process: A Solution to the Problem of the Criminal Conviction Obtained by Law Enforcement Misconduct*, 7 FORDHAM URB. L.J. 35, 49 (1978).

actually assist the defendant to an outrageous degree. It is only at that point that one could argue that the government has directly invaded an individual's right to privacy and violated his liberty. Until this point is reached, the government has merely played the latent role of tempter. Where exactly this line should be drawn must be determined on a case-by-case basis. It should include government participation which does more than merely tempt a defendant; the participation would at least entail active assistance by the government agents in consummating the crime. In most cases, this would require that the defendant be given some sort of positive help in the form of materials, knowledge, or physical assistance in committing the crime. This is to be contrasted with government involvement that does no more than entice, lure, tempt, or induce the defendant into committing the crime by *himself*.

The protection from mere temptations, as we have seen, has been relegated exclusively to the entrapment defense which turns on the defendant's predisposition. The due process defense is not intended to protect the predisposed defendant who was subjected to temptation; rather, the defense is intended to protect the predisposed defendant who was subjected to outrageous government misconduct. Because the ABSCAM defendants were only exposed to temptations, they only could have availed themselves of the entrapment defense. Their predisposition, however, prohibited this.

It is true that one's right to due process encompasses more than just the rights enumerated in the Constitution.<sup>182</sup> The right should include the general "ability of individuals to engage in freedom of action within a society and free choice as regards their personal lives."<sup>183</sup> This right may be violated when the government wrongfully and physically restrains a person's freedom of movement or invades his body.<sup>184</sup> Due process also may be violated by government agents directly assisting the defendant in the commission of a crime.<sup>185</sup> In the latter situation, it can be argued that the defendant's "freedom of action" has been restricted because the agent's interference is more direct and determinative. The defendant's freedom to make choices is much less impaired when the agents merely *offer* inducements.

## V. CONCLUSION

Even after taking a broader view of the scope of the due process defense, by only employing notions of fundamental fairness, it is

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<sup>182</sup>J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 487 (1978).

<sup>183</sup>*Id.* at 490.

<sup>184</sup>*See, e.g.,* Rochin v. California, 342 U.S. 165 (1952).

<sup>185</sup>*See supra* notes 44-49, 54-67 and accompanying text.

reasonable to assume that the Supreme Court would not sustain such a defense if it is presented by one of the ABSCAM defendants. Nevertheless, the resolution of this issue is not certain and the decisions of *Jannotti* and especially *Kelly* make it likely that the Supreme Court ultimately will have to pass judgment on ABSCAM. Beyond this particular factual setting, ABSCAM presents an ideal opportunity for the Court to clarify the defense it left dangling in *Russell* and *Hampton*. Of course, if the Court should take this writer's view that ABSCAM does not present a valid due process issue, any clarification would be dicta; nevertheless, the Court has the opportunity to clear up much confusion in this area.

If the Court decides that some or all of the ABSCAM defendants have a valid due process claim, it will be breaking new ground. Despite any similarities between the ABSCAM cases and the precedents which have recognized the defense, the latter can be easily distinguished on two grounds: they involved contraband and government agents who provided outrageous assistance.<sup>186</sup> To the extent that it is possible to help someone *receive* a bribe, a due process defense based on these precedents might be cognizable. Because the government agents in ABSCAM did not provide outrageous assistance, but only assumed the roles of tempters, a successful due process defense would depend upon the Court's finding that an individual has a due process right not to be *tempted* in a way that is fundamentally unfair.

JAMES P. MOLOY

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<sup>186</sup>*Id.*

# Crossed Signals: Copyright Liability for Resale Carriers of Television Broadcasts

## I. INTRODUCTION

Although the legal battles triggered by cable television systems' reception and retransmission of broadcast television programs have been fought on the grounds of copyright law for over a decade,<sup>1</sup> until very recently, the combatants have been limited to the copyright owners of television programs and the broadcasters on one side and the cable systems on the other side. However, two recent copyright cases, *WGN Continental Broadcasting Co. v. United Video, Inc.*<sup>2</sup> and *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*<sup>3</sup> (*EMI*), have drawn a new party, allied with the cable systems, into the fray.

This new party is the resale carrier of broadcast television signals, which receives the broadcaster's signal and retransmits it to the cable systems,<sup>4</sup> which in turn retransmit the signal to their subscribing customers who pay for the cable service. In the *WGN* and *EMI* cases, the resale carriers sought absolute exemption from copyright infringement liability for their use of the copyrighted programs that were contained in the broadcaster's signal, even though the Copyright Act of 1976<sup>5</sup> imposes statutory liability on the cable systems for use of the same programs.<sup>6</sup> In *WGN*, the Seventh Circuit reversed the district

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<sup>1</sup>See *Teleprompter Corp. v. Columbia Broadcasting Sys.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968).

<sup>2</sup>523 F. Supp. 403 (N.D. Ill. 1981) [hereinafter cited as *WGN I*], *rev'd*, 685 F.2d 218 (7th Cir. 1982) [hereinafter cited as *WGN II*].

<sup>3</sup>534 F. Supp. 533 (N.D.N.Y.), [hereinafter cited as *EMI I*], *rev'd*, 691 F.2d 125 (2d Cir. 1982) [hereinafter cited as *EMI II*], *cert. denied*, 51 U.S.L.W. 3601 (1983) (No. 82-957).

<sup>4</sup>This retransmission is accomplished either by microwave relay or via satellite. For a more detailed description of these methods, see *EMI II*, 691 F.2d at 128. Retransmission by satellite is becoming the dominant method, because it allows the resale carriers to deliver their product farther and more economically. See *Southern Satellite Sys., Inc.*, 62 F.C.C.2d 153, 159 (1976). As of September, 1981, there were nine domestic satellites in orbit, each satellite having approximately 24 transponders or channels through which the retransmission is made, and all of the transponders were occupied. In addition, even though the Federal Communications Commission (FCC) estimates that satellite capacity will triple by 1984, one industry source stated that "about 95% of all the capacity the FCC approved for launch through 1985 has already been spoken for." *BUS. WK.*, Sept. 14, 1981, at 89-90.

<sup>5</sup>17 U.S.C. §§ 101-810 (Supp. V 1981).

<sup>6</sup>*Id.* § 111(c). A related subsection of The Copyright Act sets forth the compulsory license fee schedule, which determines the amount of copyright royalties paid by the cable systems. *Id.* § 111(d). For a detailed description of the compulsory license system, see Note, *Cable Television's Compulsory License: An Idea Whose Time Has Passed?*, 25 N.Y.L. SCH. L. REV. 925, 941-43 (1980). For a less detailed discussion of the compulsory license system, see *infra* notes 55-65 and accompanying text.

court<sup>7</sup> and denied the resale carrier the exemption;<sup>8</sup> but, the Second Circuit in its *EMI* decision, also reversing the lower court,<sup>9</sup> granted full exemption to the resale carrier.<sup>10</sup>

This Note will begin its examination of the issues that determine the resale carriers' copyright infringement liability by tracing the policies and regulations of both Congress and the Federal Communications Commission (FCC) that affect the resale carriers. The Note will then balance the underlying public interest considerations concerning the carriers' copyright infringement liability. Finally, the arguments, decisions, and implications of the *WGN* and *EMI* cases will be analyzed. Before these issues can be discussed profitably, however, the reader must have a basic understanding of the market forces that are at work in the television industry. It is the disturbance of these forces that causes the copyright owners and the broadcasters to contend that resale carriers should be liable for copyright infringement.

## II. BACKGROUND

### A. Distant Signal Importation

Cable television programming that is included in the basic subscription fee comes from two sources. First, cable systems are required by FCC regulations to carry the signals of local broadcast stations.<sup>11</sup> Local stations are those stations that are located in the same geographic region, or market, in which a cable system operates. Secondly, the cable systems are permitted to import signals sent by a resale carrier from distant, or nonlocal, markets.<sup>12</sup>

The resale carrier exports a distant broadcast signal to the importing cable system either by microwave relay or by satellite retransmission.<sup>13</sup> Any cable system that imports one or more distant signals must pay two fees: a copyright fee under the Copyright Act's compulsory license system<sup>14</sup> and a fee to the resale carrier that ex-

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<sup>7</sup>*WGN I*, 523 F. Supp. at 415.

<sup>8</sup>*WGN II*, 685 F.2d at 224.

<sup>9</sup>*EMI I*, 534 F. Supp. at 538-39.

<sup>10</sup>*EMI II*, 691 F.2d at 133-34.

<sup>11</sup>47 C.F.R. §§ 76.57(a), 76.59(a), 76.61(a) (1981). Collectively, these regulations are known as the must-carry rule.

<sup>12</sup>A cable system is presently permitted to import an unlimited number of distant signals. *Id.* §§ 76.57(b), 76.59(b), 76.61(b). Prior to October 14, 1980, the "distant signal rule" placed a limit on the number of signals that could be imported. *Id.* §§ 76.59(b)-(e), 76.61(b)-(f), 76.63 (1979). However, this limitation was eliminated in 1980. 45 Fed. Reg. 60,299 (1980). See *infra* notes 66-73 and accompanying text.

<sup>13</sup>See *EMI II*, 691 F.2d at 128.

<sup>14</sup>17 U.S.C. § 111(c)-(d) (Supp. V 1981). See Note, *supra* note 6. See *infra* notes 54-65 and accompanying text.

ports the distant signal.<sup>15</sup> The cable system's revenue is derived from subscription fees paid by those who receive the cable service.

The resale carriers' cost of doing business does not include copyright fees at present but does include expenses for building and maintaining microwave relays and the cost of acquiring the use of a satellite transponder, which is leased from the satellite owner.<sup>16</sup> The cable systems that receive the resale carriers' retransmission of the broadcast signal typically pay the carrier ten cents per subscriber per month for the retransmission service.<sup>17</sup>

### *B. The Marketing of Broadcast Television Programming*

To understand the copyright owners' and the broadcasters' allegations of the damage that is caused by the resale carriers' retransmission of broadcast signals, the manner in which broadcast television programs are marketed must be understood. Because the typical resale carrier of television signals retransmits the signal of an independent broadcast station,<sup>18</sup> that is, a station not affiliated with a network, the present discussion will be limited to the marketing of television programs to independent stations.

Independent broadcasters usually buy programs directly from program producers who have chosen not to market their work through the networks or from a syndicator who is authorized by the copyright owner to negotiate the sale of the rights to broadcast a program. The broadcaster purchases the exclusive right to show the program in its market for a limited period of time.<sup>19</sup> The copyright owners generally

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<sup>15</sup>See *infra* note 17 and accompanying text.

<sup>16</sup>Transponders are usually leased on an accelerating rate schedule. For example, Southern Satellite Systems' agreement in 1976 with RCA Americom for the lease of one transponder provided for payments of \$648,000 for the first year, \$828,000 for the second year, and, if Southern exercised its option to renew, \$1,000,008 per year thereafter. Southern Satellite Sys. Inc., 62 F.C.C.2d 153, 154 (1976).

<sup>17</sup>Brotman, *Cable Television and Copyright: Legislation and the Marketplace Model*, 2 COMM/ENT L.J. 477, 481 (1980). (For the convenience of the reader, the full title of this relatively new periodical is: COMM/ENT A JOURNAL OF COMMUNICATIONS AND ENTERTAINMENT LAW).

<sup>18</sup>The cable systems want to provide their viewers with programs that the viewers cannot receive over-the-air from local broadcasters. The programs that are provided by the networks to their nationwide affiliates are the same in every market. Therefore, assuming that all three networks operate in the cable system's market, the importation of a distant network affiliate's signal would, for the most part, merely duplicate the programming available to viewers over-the-air from the network affiliate in that market. The resale carriers, thus, find a greater demand among the cable systems for an independent station's non-network programming, which avoids such duplication and allows the cable systems to offer their existing and potential customers more diverse programming than is available from local broadcasters.

<sup>19</sup>Note, *supra* note 6, at 936.

operate on a marketing plan in which they sell their programs in different markets at different times, usually starting in the largest markets and working down to the smaller ones.<sup>20</sup> The fee charged by the copyright owner for the right to show a program varies with the size of the broadcaster's potential audience.<sup>21</sup> In the case of the broadcaster whose signal is not retransmitted by a resale carrier to distant cable systems, the size of the potential audience is determined solely by the size of the broadcaster's market.

Once the independent station has purchased the right to broadcast a program, the station seeks to profit by selling time to those willing to pay to advertise during a given program. The larger the audience for a program, the more valuable the air time is to the advertiser.<sup>22</sup> Thus, the value of a program to the broadcaster also depends upon the size of the audience that the program attracts, which in turn depends on several other factors. The first factor is the quality of the program: in essence, its popularity with the viewing public. Another factor is the promotional efforts that are put into attracting an audience by the broadcaster. A third factor is the time at which the program is broadcast. Finally, the exclusivity of the program in a given market is an important factor.<sup>23</sup> If the viewers can only watch a certain program on one channel at one time each day or each week, the audience for that program will be larger than if the show is available at another time or on another channel.

The exclusivity factor is the factor most important to the present discussion, because the copyright owners and the broadcasters allege that the activities of the resale carriers place this factor beyond their control. They claim that when a resale carrier exports a broadcast signal to a distant cable system without their consent, thereby increasing the size of the audience, the copyrighted programs that are contained in that signal become less exclusive and, therefore, less valuable.<sup>24</sup>

### *C. Problems Created by Distant Signal Importation*

The copyright owners who market their television programs in different markets at different times claim that their marketing plan is ruined when the signal that carries a television program, which is sold to a broadcaster in one market is then retransmitted by a resale carrier to a cable system in a distant market.<sup>25</sup> The copyright

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<sup>20</sup>*Id.* at 928.

<sup>21</sup>See Brotman, *supra* note 17, at 481-82.

<sup>22</sup>See Student Symposium, *Regulatory Versus Property Rights Solutions for the Cable Television Problem*, 69 CALIF. L. REV. 527, 528-29 (1981).

<sup>23</sup>Note, *supra* note 6, at 936.

<sup>24</sup>See *id.*

<sup>25</sup>See Note, *supra* note 6, at 928.

owners claim that when they attempt to sell their programs in the distant market, the shows have already penetrated the cable portion of the audience.<sup>26</sup> The broadcaster will not be willing to pay the copyright owner as much for distribution rights to the program because the program is less exclusive and, therefore, less valuable to the broadcaster in the second market.<sup>27</sup>

The broadcaster whose signal is imported by the distant cable system claims that exportation of his signal by the resale carrier results in higher charges demanded by the copyright owner for rights to show a program, because the copyright owner bases his fee to the broadcaster on the potential size of the broadcaster's audience.<sup>28</sup> If the broadcaster's signal is retransmitted nationwide by a resale carrier to cable systems, the copyright owner charges the broadcaster a fee based on a nationwide audience. The copyright owner assumes that the larger audience means larger advertising revenue for the broadcaster, and so charges more for rights to show the program.<sup>29</sup>

The broadcasters allege that this fee basis is unfair for two reasons. First, although the audience for the retransmitted broadcast signal may be larger, even nationwide, the advertisers in the broadcaster's local market may not value the nationwide audience as potential customers and, thus, may not be willing to pay the higher prices that are charged for advertising time.<sup>30</sup> Secondly, because of the FCC's open entry policy<sup>31</sup> and the Copyright Act's passive carrier exemption,<sup>32</sup> the broadcaster is helpless to prevent the retransmission of his signal and, therefore, is unable to control the cost of acquiring the rights to a program.<sup>33</sup>

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<sup>26</sup>*Id.*

<sup>27</sup>*Id.* at 928-29.

<sup>28</sup>See Brotman, *supra* note 17, at 481-82.

<sup>29</sup>See *id.* The higher charge may help compensate the copyright owner for the decreased revenues he might expect to receive when he attempts to sell his program to a broadcaster in the market where the importing cable system is located. See *supra* note 27 and accompanying text.

<sup>30</sup>See Student Symposium, *supra* note 22, at 530. At least one broadcaster has attempted to take advantage of the exportation of his signal to widely distributed cable systems. Ted Turner, the unabashedly ambitious founder of the original "superstation," WTBS (formerly WTCG) in Atlanta, has sought national advertisers for his station. His station's signal is delivered by resale carrier Southern Satellite Systems to 20.4 million of the 31 million American homes having cable television. In those 20.4 million homes, WTBS is estimated to command about a tenth of the audience throughout the day. *TIME*, Aug. 9, 1982, at 51. Turner hopes to attract national advertisers by charging them for advertising time at a rate that is lower than the networks charge (30% lower in 1980) yet higher than local rates, thereby increasing his revenues. *Wall St. J.*, Jan. 9, 1979, at 1, col. 1.

<sup>31</sup>See *infra* notes 37-48 and accompanying text.

<sup>32</sup>See *infra* notes 49-53, 133-54 and accompanying text.

<sup>33</sup>KTTV (TV) in Los Angeles, dissatisfied with this situation, petitioned the FCC

The broadcasters that are in the same market as an importing cable system claim that they also are damaged by distant signal importation. The broadcaster has purchased from the copyright owner the exclusive rights to a given program, which may be violated if the importing cable system receives a signal that carries the same program.<sup>34</sup> The exclusivity that the broadcaster bargained for is destroyed, and the value of the program is reduced because the audience is fragmented into one segment watching the show on the local broadcast station<sup>35</sup> and another segment watching it on the signal imported by the cable system.

The copyright owners' and the broadcasters' dissatisfaction centers on their belief that the retransmission and the importation of broadcast television signals disturb the exclusivity of their programs, thereby damaging the programs' value. They point to the resale carriers as the culprits in upsetting the market forces on which their marketing schemes rely. The resale carriers have relatively unrestricted use of the broadcast signals, which contain copyrighted programs, yet, although the resale carriers profit from that use, they pay neither copyright royalties to the copyright owners nor retransmission consent fees to the broadcasters. However, the play of the market forces in this field has not occurred in a regulatory vacuum. An analysis of the federal regulations and policies that affect the resale carriers reveals that the lack of restrictions on the resale carriers' use of the broadcast signals is no accident.

### III. FEDERAL REGULATIONS AND POLICIES AFFECTING RESALE CARRIERS

Although federal regulation of the cable industry as a whole has only recently begun to encourage the industry's growth,<sup>36</sup> the regula-

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to review its decision granting resale carrier ASN, Inc., authority to retransmit the KTTV signal. The broadcaster claimed that ASN was "appropriating and selling, without consent and for profit," programming purchased by KTTV for broadcast to the Los Angeles television market. Brotman, *supra* note 17, at 482. The question was mooted, however, when the resale carrier's business failed before it retransmitted the broadcaster's signal.

<sup>34</sup>The exclusivity purchased by the broadcaster was protected until 1980 under 47 C.F.R. § 76.151-.161 (1980), which required a cable system to delete programming at the request of a broadcaster in the same market who owned exclusive rights to the program. This "syndicated program exclusivity rule" was removed from FCC regulations, effective October 14, 1980. 45 Fed. Reg. 60,299 (1980). A revision of the copyright law introduced to Congress in 1982 would have established statutorily a limited form of this rule. H.R. 5949, 97th Cong., 2d Sess. § 101(d) (1982). However, the bill died in the Senate at the expiration of the 97th Congress. See *infra* note 175.

<sup>35</sup>See *supra* note 11 and accompanying text.

<sup>36</sup>Federal regulation of the cable industry as a whole has developed in five stages. See *Malrite T.V. v. FCC*, 652 F.2d 1140, 1143-47 (2d Cir. 1981).

tions and policies that affect the resale carriers of broadcast television signals have consistently encouraged the freedom of that segment of the cable industry.

*A. Regulations Directly Affecting the Resale Carriers*

1. *The FCC's Open Entry Policy.*—The FCC first announced its open entry policy for resale carriers of communications services in its decision in *Resale and Shared Use of Common Carrier Services and Facilities*.<sup>37</sup> Having determined that a policy of open entry into the resale carrier market would be in the public interest,<sup>38</sup> which is re-

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Stage 1: Prior to 1966 the FCC denied that it had jurisdiction to regulate the cable industry directly. *See* *Frontier Broadcasting Co.*, 24 F.C.C. 251 (1958).

Stage 2: In 1966 the FCC began to regulate cable television directly as cable operations expanded from simple signal enhancement in areas where reception was poor to importation of distant signals. *See* *Community Antenna Television Sys.*, 2 F.C.C.2d 725 (1966). The Supreme Court upheld the FCC's power to regulate the cable industry, so long as the particular regulations were "reasonably ancillary" to the performance of the FCC's statutory duties. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). From 1966 to 1972, FCC regulations protected existing broadcasters at the expense of the cable industry. For example, the cable systems were required to purchase the consent of broadcasters whose signals the cable systems wanted to retransmit to their subscribing customers. The result of this "retransmission consent" experiment was a freeze of the cable industry, as broadcasters denied virtually all cable systems' requests for retransmission rights. *Malrite*, 652 F.2d at 1148 n.9.

Stage 3: In 1972 a consensus agreement, negotiated by the White House among the affected television industry interests—program producers, broadcasters, and cable systems—eased the restrictions placed on the cable industry, permitting its limited expansion. *See* *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972).

Stage 4: In *Teleprompter Corp. v. Columbia Broadcasting Sys.*, 415 U.S. 394 (1974), the Supreme Court rejected the argument that cable systems should be held liable for copyright infringement when retransmitting broadcasters' signals that contained copyrighted programs, but the Court also called for congressional action on the matter. *Id.* at 414. Congress responded to the promptings of the Court by enacting the Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1976). Subsections 111(c)-(d) of the Act established the compulsory license system, which imposed copyright infringement liability on the cable systems but allowed for their expansion by licensing their access to distant signals. *Id.* § 111(c)-(d) (Supp. V 1981). *See infra* notes 55-65 and accompanying text.

Stage 5: In 1980 the FCC began to deregulate the cable industry by repealing the distant signal and syndicated program exclusivity rules. *Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C.2d 663 (1980), *aff'd sub nom. Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir.), *cert. denied*, 102 S. Ct. 1002 (1981). This signaled the end of the FCC's restrictive regulation of the cable industry.

<sup>37</sup>60 F.C.C.2d 261 (1976), *aff'd sub nom. American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

<sup>38</sup>The FCC "warranted" its belief that open entry to the communications common carrier market would have beneficial effects, "based on our cumulative knowledge of the industry," in 1971. *Specialized Common Carrier Services*, 29 F.C.C.2d 870, 910 (1971). Five years later, the FCC extended its expectation of beneficial effects from open

quired by section 214 of the Communications Act as interpreted by the Supreme Court,<sup>39</sup> the FCC established minimum requirements for certification of applicants for status as common carriers offering resale services. Applicants are required only to demonstrate "that they are technically, legally and financially qualified to provide the service which they propose."<sup>40</sup>

The FCC anticipated that the competition fostered by open entry into the resale market would have many beneficial effects, such as a "more efficient utilization of existing communication capacity; better management of communications networks; improved marketing of communications services and facilities; a wider variety of communications offerings; and increased research, development and implementation of communications technology."<sup>41</sup>

The *Resale and Shared Use* decision defined the term "resale" as "the subscription to communications services and facilities by one entity and the reoffering of communications services and facilities to the public . . . for profit."<sup>42</sup> That decision expressly applies only to the traditional types of "sender" resale services, such as those offered by American Telephone & Telegraph, Bell Systems, and Western Union. But, the FCC's decision in *Southern Satellite Systems, Inc.*<sup>43</sup>

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entry to the resale carrier market in its *Resale and Shared Use* decision, 60 F.C.C.2d at 310.

<sup>39</sup>47 U.S.C. §§ 101-744 (1976). Subsection 214(a) of the Act provides that any applicant for communications common carrier status must obtain certification from the FCC that "[t]he present or future public convenience and necessity require or will require" the new carrier service. *Id.* § 214(a). The Supreme Court has held that the public interest requirement is not met by the FCC's mere presumption that competition in and of itself will benefit the public:

In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit.

. . . [B]ut the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. . . . Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one [the common carrier industry], is not enough.

FCC v. RCA Communications, 346 U.S. 86, 96-97 (1953).

<sup>40</sup>60 F.C.C.2d at 312.

<sup>41</sup>*Id.* at 302.

<sup>42</sup>*Id.* at 263.

<sup>43</sup>62 F.C.C.2d 153 (1976). The Southern Satellite's application proposing to "lease domestic satellite facilities for the multipoint distribution of television broadcast signals primarily to widely dispersed cable television systems," *id.* at 159, was considered a first by the FCC: "[T]his application appears to be an innovative combination of new technology and established practices." *Id.* It was anticipated that the proposed service would supply "the more efficient utilization of existing communications capacity," *id.*; see *supra* note 41 and accompanying text, and that it would "make available a service that cannot be efficiently or economically provided by terrestrial means [such

brought the resale carriers of broadcast television signals, who serve the receivers of communications,<sup>44</sup> within the resale definition and applied the policies that were stated in *Resale and Shared Use* to these carriers.<sup>45</sup> The definitive statement of the open entry policy for the resale carriers of broadcast television signals was subsequently made by the FCC in *United Video, Inc.*:<sup>46</sup>

This Commission has determined that the public interest would be served by permitting the entry of resale entities into communications common carrier markets without requiring a showing of a special need for service or assessing the economic impact of entry on other carriers. We accordingly declared that we . . . will grant all applications which demonstrate that the reseller has the necessary legal, technical, and financial qualifications to perform the resale service.

This Commission subsequently determined that persons who lease satellite facilities for the purpose of providing common carrier communications services to cable systems are resellers and that the policies established in the *Resale and Shared Use* decision govern the processing of . . . applications to provide such services.<sup>47</sup>

By permitting resale applicants to enter the common carrier market based only upon a showing of "legal, technical, and financial qualification," the FCC has encouraged more applicants to enter the business of reselling communications services, and, thus, has encouraged the activities of the resale carriers of broadcast television signals.<sup>48</sup>

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as microwave relay] and would result in an increase in the diversity of cable television programming available to the public." 62 F.C.C.2d at 159-60. Consequently, Southern's application was approved as consistent with FCC policy and the public interest. *Id.* at 160.

<sup>44</sup>The distinction between resale carriers that serve senders and those that serve receivers of communications was repeatedly pointed out by the Second Circuit in *EMI II*. See *EMI II*, 691 F.2d at 128, 130, 131. Indeed, the failure of the district court to discern this distinction appears to have been one of the major faults in its decision, which required its reversal. See *infra* notes 134-54, 157 and accompanying text.

<sup>45</sup>62 F.C.C.2d at 159-60.

<sup>46</sup>69 F.C.C.2d 1629 (1978).

<sup>47</sup>*Id.* at 1635-36 (citations omitted).

<sup>48</sup>This is not to say that, once a qualified applicant is authorized by the FCC to engage in resale activities involving television signals, the applicant may operate absolutely free of all restrictions. For example, the FCC imposed the following restrictions upon the operations of resale carrier United Video, Inc.: (1) the carrier's authorization was limited to five years; (2) FCC authorization was required before the carrier could transmit to additional cable systems or could terminate service to previously authorized systems; (3) the carrier was prohibited from serving customers affiliated with or related to the carrier for a greater number of hours per month than it served

2. *The Section 111(a)(3) Exemption.*—The Copyright Act of 1976<sup>49</sup> also directly encourages the resale carriers' operations. Congress provided for an exemption from copyright liability when

the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others . . . .<sup>50</sup>

The legislative history of the Copyright Act leaves some doubt whether this exemption was intended to apply to the traditional types of common carriers,<sup>51</sup> such as the owner of a satellite who leases a transponder for the use of a resale carrier of television signals.<sup>52</sup> The most recent and authoritative judicial interpretation of the exemption statute held that the exemption does indeed apply to the resale carriers of broadcast television signals.<sup>53</sup> Assuming that the interpretation that Congress did intend the exemption to apply is correct, the presence of the exemption in the Copyright Act demonstrates Congress' intent to permit the free and unrestricted retransmission of television signals by the resale carriers. A more direct encouragement of the carriers' activities is difficult to imagine.

#### *B. Regulations Having an Indirect Effect on Resale Carriers*

Any regulation that facilitates distant signal importation by the

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unrelated customers; (4) the carrier was prohibited from substantial involvement in the production, writing, selection or influencing of the content of any signals it transmitted; (5) the carrier was required to file a tariff with the FCC fully describing the services provided and the charges therefore; (6) the carrier was prohibited from rendering service to any cable system that was not authorized by the FCC to use the transmitted signal. *United Video, Inc.*, 69 F.C.C.2d 1629, 1641-42 (1978).

<sup>49</sup>17 U.S.C. §§ 101-810 (Supp. V 1981).

<sup>50</sup>*Id.* § 111(a)(3).

<sup>51</sup>See *EMI I*, 534 F. Supp. 533, 538 n.14. *But see* H.R. REP. NO. 559, 97th Cong., 2d Sess. (1982) (report of the House Committee on the Judiciary of a bill that, *inter alia*, would have amended the present section 111(a)(3) to ensure that the exemption would apply to resale carriers of television signals). See also H.R. 5949, 97th Cong., 2d Sess. § 101(a) (1982). See *infra* notes 169-75 and accompanying text. The report on this bill states: "There has *never* been any doubt by this Committee that carriers are exempt from copyright liability when retransmitting television signals to cable systems via terrestrial microwave or satellite facilities." H.R. REP. NO. 559, 97th Cong., 2d Sess. 5 (1982) (emphasis added). Admittedly, this post hoc assertion of the legislative intent does not make certain that Congress intended the original section 111(a)(3) to apply to resale carriers of broadcast television signals. *EMI II*, 691 F.2d 125, 129 n.11.

<sup>52</sup>See *EMI II*, 691 F.2d at 132 n.17.

<sup>53</sup>*Id.* at 133-34.

cable systems has the indirect effect of encouraging the activity of the resale carriers of television signals, because the resale carriers are the "conduit" through which distant signals are delivered to the cable systems.<sup>54</sup> The regulations discussed below have the direct effect of facilitating distant signal importation.

1. *The Compulsory License System.*—The most innovative feature of the Copyright Act of 1976<sup>55</sup> was the creation of the compulsory license system.<sup>56</sup> Clause 111(c)(1) of the Act provides that the license applies to "secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission . . . and embodying a performance or display of a [copyrighted] work . . . ."<sup>57</sup> The remaining clauses of subsection 111(c) describe acts of infringement,<sup>58</sup> which are subject to the remedies described in the Act.<sup>59</sup>

Subsection 111(d) of the Act requires the cable system seeking a license for its retransmissions of a broadcaster's signal to fulfill certain requirements.<sup>60</sup> The most important clauses of this subsection require that the cable system deposit a royalty fee, which is based on the number and kind of distant signals imported by the cable system and on its gross receipts, with the Register of Copyrights.<sup>61</sup>

In its recent *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*<sup>62</sup> (*EMI II*) decision, the Second Circuit recognized the vital role that the resale carriers of television signals play in the compulsory license system by stating that "the compulsory licensing scheme . . . is predicated on and presupposes a continuing ability of CATV systems

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<sup>54</sup>See *EMI II*, 691 F.2d at 132.

<sup>55</sup>17 U.S.C. §§ 101-810 (Supp. V 1981).

<sup>56</sup>*Id.* § 111(c)-(d).

<sup>57</sup>*Id.* § 111(c)(1).

<sup>58</sup>See 17 U.S.C. § 501 (Supp. V 1981). The broadest and most important limitation on the license granted to the cable systems incorporates the FCC's rules and regulations affecting cable systems. *Id.* § 111(c)(2)(A). Also, a cable system must meet the requirements of subsection 111(d) to qualify for the license. *Id.* § 111(c)(2)(B). See *infra* notes 60-61 and accompanying text. Further, a cable system may not change, delete, or add to the content of any program, commercial advertisement, or station announcement that is contained in the broadcaster's primary transmission. 17 U.S.C. § 111(c)(3) (Supp. V 1981). Finally, infringements of broadcast signals that are authorized by the governments of Canada or Mexico are prohibited. *Id.* § 111(c)(4).

<sup>59</sup>See 17 U.S.C. §§ 502-506, 509-510.

<sup>60</sup>The cable system must provide the Copyright Office with information regarding the ownership of the system and with notice of the broadcast stations whose primary transmissions are to be carried regularly by the cable system. *Id.* § 111(d)(1). Also, the Register of Copyrights must be informed of certain matters, including the gross receipts received by the cable system from its subscription-paying customers. *Id.* § 111(d)(2)(A).

<sup>61</sup>*Id.* § 111(d)(2)(B)-(D). See Note, *supra* note 6, at 941-43.

<sup>62</sup>691 F.2d 125 (2d Cir. 1982).

to receive signals for distribution to their subscribers."<sup>63</sup> The court further stated that

imposition of individual copyright owner negotiations on intermediate carriers would strangle CATV systems by choking off their life line to their supply of programs, would effectively restore the "freeze" on cable growth [which existed during the retransmission consent experiment between copyright owners and cable systems from 1968-1972<sup>64</sup>] . . . and, most importantly, would frustrate the congressional intent reflected in the Act by denying CATV systems the opportunity to participate in the compulsory licensing program. After years of consideration and debate, Congress could not have intended that its work be so easily undone by the interposition of copyright owners to block exercise of the licensing program by cable systems.<sup>65</sup>

2. *The Repeal of the Distant Signal Rule.*—Prior to 1980, FCC regulations limited the number of distant signals that a cable system could import.<sup>66</sup> The limitations varied according to the size of the market in which the importing cable system was located. For example, a cable system in one of the top fifty markets could make available to its subscribers a total of three independent and three network stations,<sup>67</sup> while a CATV system that was not located in one of the top one hundred markets was limited to offering three network stations and one independent station.<sup>68</sup> Of course, these totals included the local stations, which the cable systems were required to provide to their customers under the must-carry rule.<sup>69</sup>

In 1980 the FCC repealed the distant signal rule.<sup>70</sup> According to the Second Circuit, which reviewed and affirmed the FCC's action, the FCC "found that the impact on broadcasting stations from the deregulation of cable television would be negligible, and that consumers would be decidedly better off due to increased viewing options from the greater availability of expanded cable services."<sup>71</sup>

The effect of the repeal of the distant signal rule was to allow

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<sup>63</sup>*Id.* at 132.

<sup>64</sup>*See* *Malrite T.V. v. FCC*, 652 F.2d 1140, 1148 n.9 (2d Cir. 1981).

<sup>65</sup>*EMI II*, 691 F.2d at 132-33.

<sup>66</sup>*See supra* note 12.

<sup>67</sup>47 C.F.R. § 76.61(b) (1979).

<sup>68</sup>*Id.* § 76.59(b). CATV is an acronym for Community Antenna Television.

<sup>69</sup>*See supra* note 11 and accompanying text.

<sup>70</sup>Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *aff'd sub nom.* *Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir.), *cert. denied*, 102 S. Ct. 1002 (1981).

<sup>71</sup>*Malrite T.V. v. FCC*, 652 F.2d 1140, 1146 (2d Cir. 1981).

cable systems to import an unlimited number of distant signals. As long as a cable system pays the increased royalty fee for additional imported signals, which is required by the Copyright Act,<sup>72</sup> the cable system may import any number of distant signals and yet retain its compulsory license.<sup>73</sup> To the extent that the repeal of the distant signal rule facilitates distant signal importation by the cable systems, the resale carriers are encouraged to deliver the signals to the cable systems.

The open entry policy, the section 111(a)(3) exemption, the compulsory license system, and the repeal of the distant signal rule all reflect the federal government's direct or indirect encouragement of the activities of the resale carriers of broadcast television signals. However, public interest considerations also enter the picture and provide arguments both for and against the unfettered retransmission of television signals by resale carriers.

#### IV. PUBLIC INTEREST CONSIDERATIONS

Underlying the controversy between the resale carriers and the copyright owners and broadcasters is the private economic interest of each group. However, the parties also can claim that their individual private interests should be protected because it is in the public interest to do so.

The copyright owners, as well as the broadcasters who purchase rights to distribute copyrighted works, point out that the Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>74</sup> Thus, copyright legislation is explicitly authorized by the Constitution as a way to encourage "Progress of . . . useful Arts" by creating an economic incentive for artists in the form of an exclusive right to profit from their work. If it is conceded that television programs come within the category of "useful Arts," then the copyright owners of those programs and the broadcasters who purchase rights to show them can argue that permitting resale carriers to profit from the use of the copyright owners' property without giving compensation will damage the public interest, because the economic incentive to create will be impaired. The result will be fewer and lower quality television programs available to the public as well as the retardation of the progress of the television producers' art.

On the other hand, the resale carriers of television signals point out that Congress and the FCC, through their regulations and pol-

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<sup>72</sup>17 U.S.C. § 111(d)(2)(B)(iv) (Supp. V 1981).

<sup>73</sup>*Id.* § 111(c)(2)(A). See *supra* note 57.

<sup>74</sup>U.S. CONST. art. I, § 8, cl. 8.

icies,<sup>75</sup> have sought to encourage diversity in television programming as a benefit to the public, and that the resale carriers are necessary to provide that diversity.

The value of program diversity has been recognized by the United States Supreme Court. The court stated in *United States v. Midwest Video Corp.*<sup>76</sup> that FCC regulations must " 'further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and *augmenting the public's choice of programs and types of service.*' " <sup>77</sup>

In addition, the Court of Appeals for the Second Circuit, in affirming the FCC's repeal of the distant signal rule,<sup>78</sup> stated that such deregulation would have negligible impact on broadcast stations, but that consumers would be decidedly better off because they would receive a greater number of viewing options from the deregulated cable systems.<sup>79</sup> The appellate court also stated:

Free television . . . limits program diversity by its concentration on mass audience shows, which make advertising worthwhile. In shifting its policy toward a more favorable regulatory climate for the cable industry, the FCC has chosen a balance of television services that should increase program diversity, a valid FCC regulatory goal.<sup>80</sup>

Congress also has recognized the public's interest in program diversity as it is fostered by the cable systems' importation of distant signals: "With advances in the state of the art, cable systems are now able to transmit signals by cable, microwave and satellite . . . far beyond the local market area. In the bill [Copyright Act of 1976] we refer to these as 'distant signals'. Admittedly they serve the public interest."<sup>81</sup>

The resale carriers argue that the recognition of the public interest in program diversity is also recognition of the public interest in the continued unrestricted retransmission of broadcast signals by the resale carriers, because, without the services of those carriers, cable systems could not provide their customers with a wide variety of programs.<sup>82</sup>

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<sup>75</sup>See *supra* notes 37-73 and accompanying text.

<sup>76</sup>406 U.S. 649 (1972) (plurality opinion).

<sup>77</sup>*Id.* at 667-68 (quoting *Community Antenna Television Sys. (CATV)*, 20 F.C.C.2d 201, 202 (1969) (emphasis added)).

<sup>78</sup>See *supra* notes 12, 66-73 and accompanying text.

<sup>79</sup>*Malrite T.V. v. FCC*, 652 F.2d 1140, 1146 (2d Cir. 1981).

<sup>80</sup>*Id.* at 1151 (citations omitted).

<sup>81</sup>H.R. REP. NO. 1476, 97th Cong., 2d Sess. 360-61 (concurring views of George E. Danielson), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5803.

<sup>82</sup>See *EMI II*, 691 F.2d 125, 132 (2d Cir. 1982).

The balance of the public interest considerations tips in favor of the resale carriers. The most important consideration supporting this conclusion is that the uninhibited operation of the resale carriers is essential to providing the public with the diversity of programming that has been determined to be in the public interest. The copyright owner/program producer's economic incentive to create television programming is provided by the broadcasters' payment to the copyright owner for the rights to broadcast programs and by the cable systems' payment of copyright royalties for the distant signals they import under the compulsory license system.<sup>83</sup> The resale carriers contend that additional compensation from them would result in a windfall to the copyright owners because the increased revenue would not reflect an increase in the number of ultimate users of the copyrighted work, the viewers.<sup>84</sup>

In *EMI II*, the Second Circuit also recognized that the public's interest in diversity of programming outweighs the interest in granting additional compensation to the copyright owners for the resale carriers' retransmission of copyrighted works:

Congress drew a careful balance [in the Copyright Act of 1976] between the rights of copyright owners and those of CATV systems, providing for payments to the former and a compulsory licensing program to insure that the latter could continue bringing a diversity of broadcasted signals to their subscribers. *The public interest thus lies in a continuing supply of varied programming to viewers. . . .* CATV systems served by intermediate carriers cannot provide their full current programming to their subscribers without the services of those carriers . . . .<sup>85</sup>

#### V. CROSSED SIGNALS: RESALE CARRIERS' COPYRIGHT LIABILITY IN COURT

The regulations and policies of Congress and the FCC<sup>86</sup> and the public interest considerations<sup>87</sup> support the unrestricted resale carriage of broadcast television signals. However, in applying the Copyright Act of 1976<sup>88</sup> to the activities of the resale carriers,<sup>89</sup> the courts seem to have their signals crossed. In *WGN Continental Broad-*

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<sup>83</sup>See 17 U.S.C. § 111(c)-(d) (Supp. V 1981). See *supra* notes 55-65 and accompanying text.

<sup>84</sup>See *EMI II*, 691 F.2d at 133.

<sup>85</sup>*Id.* at 132 (emphasis added).

<sup>86</sup>See *supra* notes 37-73 and accompanying text.

<sup>87</sup>See *supra* notes 74-85 and accompanying text.

<sup>88</sup>17 U.S.C. §§ 101-810 (Supp. V 1981).

<sup>89</sup>See *id.* § 111(a)(3).

*casting Co. v. United Video, Inc. (WGN I)*,<sup>90</sup> the district court held that the resale carrier's retransmission of the broadcaster's signal was not an infringement of a copyright;<sup>91</sup> however, the Seventh Circuit reversed the lower court's decision.<sup>92</sup> In *Eastern Microwave, Inc. v. Doubleday Sports, Inc. (EMI I)*,<sup>93</sup> the district court held that the resale carrier's activity did constitute copyright infringement<sup>94</sup> but was reversed on appeal by the Second Circuit.<sup>95</sup>

The permutation of these decisions seems to indicate that the courts are quite confused on the question of copyright infringement liability for the resale carriers of broadcast television signals. Although a closer analysis of the cases reveals that each decision is consistent with the copyright law, a clarification of the present copyright act would be very helpful in guiding the courts and potential litigants in this area.<sup>96</sup> A juxtaposition of the decisions in the *WGN* and *EMI* cases brings into focus the issues that determine resale carriers' infringement liability under the present copyright law.

#### A. The Public Performance Issue

Subsection 106(4) of the Copyright Act of 1976 grants an owner

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<sup>90</sup>523 F. Supp. 403 (N.D. Ill. 1981), *rev'd*, 685 F.2d 218 (7th Cir. 1982). The broadcaster in this case brought action to enjoin the resale carrier from retransmitting its signal after the broadcaster learned that the carrier was stripping a part of the signal, known as the vertical blanking interval, before retransmitting it. The broadcaster transmitted experimental teletext material in the blanking interval, and the resale carrier stripped this material and replaced it with the carrier's own information. The broadcaster alleged that such activity by the carrier infringed the broadcaster's copyright of the nine o'clock news program, during which the teletext was inserted in the blanking interval, and of the teletext material itself. An important fact of this case is that the broadcaster registered the news program and the teletext under a single copyright.

<sup>91</sup>*Id.* at 415.

<sup>92</sup>*WGN II*, 685 F.2d 218, 224 (7th Cir. 1982).

<sup>93</sup>534 F. Supp. 533 (N.D.N.Y.), *rev'd*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3601 (1983) (No. 82-957). In this case, the resale carrier sought a declaratory judgment that its activities with respect to the copyright owner's work did not constitute copyright infringement. The carrier retransmitted the broadcast signal of WOR-TV, New York, which had contracted with the owner of the New York Mets for the rights to broadcast a number of their baseball games. The Mets' owner also owned the copyrights to these ballgames. Although the broadcaster did not object to the retransmission of its signal by the resale carrier, the copyright owner did object to the retransmission of its copyrighted work, that is, the Mets' games that were contained within the signal. In a series of letters to the resale carrier, the copyright owner insisted that the retransmission of the baseball games constituted infringement of the copyright and demanded that the carrier cease those retransmissions. The carrier refused and brought this suit for a declaratory judgment that it was not infringing the copyright.

<sup>94</sup>534 F. Supp. at 538.

<sup>95</sup>691 F.2d at 133-34.

<sup>96</sup>*See* H.R. 5949, 97th Cong., 2d Sess. § 101(a) (1982).

of a copyright on an audiovisual work the exclusive right to "perform the copyrighted work publicly."<sup>97</sup> Thus, before a resale carrier can be held liable for copyright infringement, its retransmission of the broadcaster's signal that contains a copyrighted work must constitute a public performance of that work. Otherwise, no violation of the copyright owner's exclusive right has occurred. The Act provides: "To perform or display a work 'publicly' means—(1) to perform or display it at a place open to the public or . . . (2) to transmit or otherwise communicate a performance . . . to the public . . . ."<sup>98</sup> Part (2) of this definition is relevant to resale carriers' retransmission of broadcast signals.<sup>99</sup>

1. *The WGN I Decision.*—The District Court for the Northern District of Illinois held that the resale carrier's retransmission of the broadcaster's signal was not a public performance of the copyrighted work, which was contained in the signal.<sup>100</sup> In effect, the court interpreted the term "public" to mean the viewing public, that is, the cable systems' subscribing customers. The court reasoned that the resale carrier's retransmission of the broadcast signal only reached the cable systems, and not the public. It was the cable systems' transmissions that reached the public.

2. *The EMI I Decision.*—The District Court for the Northern District of New York declined to take the narrow view of the term "public" taken in the *WGN* district court decision.<sup>101</sup> The district court in *EMI I* stated that Congress could have limited its definition of the term to members of the viewing public, but had not done so.<sup>102</sup> The court held that the cable systems to whom the resale carrier retransmitted the copyrighted work were themselves members of the public and that the carrier's retransmission of the broadcaster's signal was, therefore, a public performance.<sup>103</sup> The district court stated:

The [district court decision in *WGN*] stated that an interpretation of the term "public" which would include the CATV systems, would, in effect, read the public requirement out of the Act. This Court does not agree. Rather, to limit the meaning of public to the viewing public without express direction

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<sup>97</sup>17 U.S.C. § 106(4) (Supp. V 1981).

<sup>98</sup>*Id.* § 101 (defining the term "publicly").

<sup>99</sup>See *WGN I*, 523 F. Supp. at 414; *WGN II*, 685 F.2d at 221; *EMI I*, 534 F. Supp. at 536.

<sup>100</sup>*WGN I*, 523 F. Supp. at 415.

<sup>101</sup>The Second Circuit did not consider the public performance issue; the appellate court rested its decision in *EMI II* solely upon the section 111(a)(3) exemption issue, see *infra* notes 134-54 and accompanying text. *EMI II*, 691 F.2d at 127 n.5.

<sup>102</sup>*EMI I*, 534 F. Supp. at 536.

<sup>103</sup>*Id.*

from Congress would be to read a narrow interpretation of public into the Act.<sup>104</sup>

3. *The WGN II Decision.*—The Court of Appeals for the Seventh Circuit also held that the resale carrier's retransmission of the broadcaster's signal was a performance of the copyrighted work to the public, but its reasoning was slightly different from that in the *EMI I* district court opinion. Rather than define the cable systems as members of the public, the Seventh Circuit found that the public performance requirement was satisfied indirectly and stated that "the Copyright Act defines 'perform or display . . . publicly' broadly enough to encompass *indirect* transmission to the *ultimate* public."<sup>105</sup> Thus, the court of appeals seemed to agree with the lower court's interpretation of the term "public" as meaning the viewing public. Nevertheless, the court reversed the district court, holding that the resale carrier's retransmission was indeed "to the public,"<sup>106</sup> albeit indirectly via the cable systems.

4. *Analysis.*—The holding in *EMI I* that the resale carrier's retransmission of the broadcast signal to the cable systems constituted a public performance, because the cable systems are themselves members of the public, is better supported than the *WGN* decisions, which limited the term "public" to the ultimate, viewing public. The FCC has indirectly recognized that cable systems are members of the public. The tariff<sup>107</sup> of Eastern Microwave, Inc. (EMI), which was filed with and approved by the FCC,<sup>108</sup> defined EMI's customers as "*any member of the public* who directly orders . . . services offered or provided by Carrier."<sup>109</sup> Because the resale carrier's customers are the cable systems that order resale services from the carrier, the FCC's approval of the tariff indicated that the FCC accepted the cable systems as members of the public. In addition, the FCC has defined "resale" as "the subscription to communications services and facilities by one entity and the reoffering of the communications services and facilities *to the public* . . . for profit."<sup>110</sup> The communications services of the resale carriers of television signals are reoffered only to cable

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<sup>104</sup>*Id.* at 537 (citation omitted) (emphasis added by court).

<sup>105</sup>*WGN II*, 685 F.2d at 221 (emphasis added).

<sup>106</sup>See *supra* note 98 and accompanying text.

<sup>107</sup>One court has defined a tariff as "a public document setting forth the services of the carrier being offered, the rates and charges with respect to the services and the governing rules, regulations and practices relating to those services." *International Tel. & Tel. Corp. v. United Tel. Co.*, 433 F. Supp. 352, 357 n.4 (M.D. Fla. 1975).

<sup>108</sup>See *Eastern Microwave, Inc.*, 70 F.C.C.2d 2195, 2203 (1979).

<sup>109</sup>*EMI I*, 534 F. Supp. at 536 n.9 (emphasis added by court).

<sup>110</sup>*Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261, 263 (1976) (emphasis added).

systems, not to members of the viewing public.<sup>111</sup> Therefore, the FCC's definition of resale indicates that the FCC recognizes the cable systems as members of the public.

The position that the term "public" means the ultimate or viewing public, which was taken in both opinions in the *WGN* case, is unnecessarily narrow.<sup>112</sup> The *WGN* district court based its interpretation of the term "public" on the Copyright Act's definition of a cable system as "a facility . . . that . . . makes secondary transmissions of [broadcast television] signals or programs . . . to *subscribing members of the public* who pay for such service."<sup>113</sup> From this definition, the district court concluded that the cable systems could not be members of the public because they "are not viewing [the broadcaster's] programming, but distributing the programming to the public."<sup>114</sup> This statement is particularly telling because it shows how, in the court's mind, the concept of public is tied to the function of viewing. Nothing in the Act requires such a connection.

The Seventh Circuit's decision in *WGN II* concerning the public performance issue was not based upon the court's reliance on textual support in the Copyright Act.<sup>115</sup> Rather, the court focused on practical reasons for considering the resale carrier's activities to be a public performance of the copyrighted material. First, the court stated that if the carrier's retransmission were not a public performance, then the section 111(a)(3) exemption<sup>116</sup> would be rendered superfluous.<sup>117</sup> Without a public performance, there could be no copyright infringement and, thus, no need for the exemption. Further, the court stated that the compulsory license system would be "disrupted, or at least made cumbersome,"<sup>118</sup> if the carrier were immune from copyright liability simply because its transmission to the viewing public was accomplished through the intermediary of the cable systems. By this

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<sup>111</sup>See *EMI II*, 691 F.2d at 127 n.6.

<sup>112</sup>See *supra* note 104 and accompanying text.

<sup>113</sup>*WGN I*, 523 F. Supp. at 414 (quoting 17 U.S.C. § 111(f) (Supp. V 1981)) (emphasis added by court).

<sup>114</sup>523 F. Supp. at 414-15.

<sup>115</sup>The circuit court's statement that an "indirect transmission to the ultimate public" would come within The Copyright Act's public performance requirement, *WGN II*, 685 F.2d at 221, implies that the court believed that a transmission to the ultimate, viewing public was necessary to a public performance. In this interpretation of the term "public," the circuit court seems to be in general agreement with the lower court. However, the Seventh Circuit stated that it could not find "good textual support for the district court's position." *Id.* Therefore, to support its holding of public performance, the circuit court was forced to turn to the implications of non-public performance. See *infra* notes 116-20 and accompanying text.

<sup>116</sup>17 U.S.C. § 111(a)(3) (Supp. V 1981). See *infra* notes 123-59 and accompanying text.

<sup>117</sup>*WGN II*, 685 F.2d at 220-21. But see *EMI II*, 691 F.2d at 132 n.16.

<sup>118</sup>685 F.2d at 221.

reasoning, the resale carrier's immunity would allow it to "mutilate to its heart's content the broadcast signal it picked up,"<sup>119</sup> and would leave the copyright owner with the burden of proceeding against the cable systems who retransmitted the mutilated signal to the public rather than against the resale carrier. This, the court warned, would require "a thousand or more copyright infringement suits instead of one."<sup>120</sup>

Whether one relies on the FCC's apparent recognition of the cable systems as members of the public<sup>121</sup> or on the practical reasons for considering the resale carrier's indirect transmission to the viewing public a public performance,<sup>122</sup> the evidence favors the conclusion that the resale carrier's retransmission of a copyrighted work that is contained in the retransmitted signal constitutes a public performance. If this conclusion were adopted, future copyright infringement suits against resale carriers would turn solely on the exemption issue.

### B. The Section 111(a)(3) Exemption Issue

Even if the resale carrier's secondary transmission<sup>123</sup> of the broadcaster's primary transmission<sup>124</sup> is held to be a public performance, the carrier nevertheless may be exempt from liability for copyright infringement if it meets the exemption requirements set forth in section 111(a)(3) of the Copyright Act.<sup>125</sup>

1. *The WGN Decisions.*—The factual setting of the *WGN* case<sup>126</sup> required the preliminary determination of the scope of the broadcaster's copyright protection. Both the nine o'clock news program and some experimental teletext material, which was transmitted in a blank portion of the broadcaster's signal during the news show, were registered under a single copyright.<sup>127</sup> The preliminary question was whether both were protected by the copyright, and if not, which of the two *was* protected.

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<sup>119</sup>*Id.*

<sup>120</sup>*Id.*

<sup>121</sup>See *supra* text accompanying notes 107-11.

<sup>122</sup>See *supra* notes 115-20 and accompanying text.

<sup>123</sup>A 'secondary transmission' is the further transmitting of a primary transmission simultaneously with the primary transmission . . . . 17 U.S.C. § 111(f) (Supp. V 1981). This includes both the resale carrier's transmission of the broadcast signal to the cable systems and the cable systems' retransmission of the signal to their customers.

<sup>124</sup>A primary transmission is defined in the statute as "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted." *Id.*

<sup>125</sup>*Id.* § 111(a)(3). See *supra* text accompanying note 49-50.

<sup>126</sup>See *supra* note 90.

<sup>127</sup>*WGN I*, 523 F. Supp. at 408.

The district court held that only the nine o'clock news program was properly registered and protected by the copyright.<sup>128</sup> The court also held that "the 'primary transmission' as used in Section 111(a)(3) means *the copyrighted work* which is initially broadcast and retransmitted."<sup>129</sup> Because the resale carrier's stripping of the teletext from the broadcast signal did not affect the retransmission of the protected news program, the district court held that the resale carrier's activities did not "constitute control over or selection of WGN's 9:00 News programs, the primary transmissions at issue in this case. Therefore, UVI [the resale carrier] is entitled to the benefit of the passive carrier exemption of Section 111(a)(3)."<sup>130</sup>

The Seventh Circuit found that the teletext was related sufficiently to the nine o'clock news program for the two to be registered under a single copyright and reversed the district court.<sup>131</sup> The circuit court held that the resale carrier's deletion of the teletext constituted "an alteration of a copyrighted work and hence an infringement under familiar principles."<sup>132</sup>

The circuit court disposed of the section 111(a)(3) exemption issue in a single sentence: "United Video cannot avail itself of the passive carrier exemption, because it was not passive—it did not retransmit WGN's signal intact."<sup>133</sup> Unfortunately, the court did not address the implied corollary of its statement—that a resale carrier who does

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<sup>128</sup>This holding was based on the Copyright Act's definition of "audiovisual works" as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors." 17 U.S.C. § 101 (Supp. V 1981). The district court deduced from this definition that "the Act contemplates one copyright for each 'series of related images.'" 523 F. Supp. at 412. But the court found that the teletext and the news program were not related sufficiently to constitute a single audiovisual work and, therefore, were not properly registered under a single copyright. *Id.* at 412-13. However, the court never fully explained why the news program, rather than the teletext material, remained within the protection of the copyright. The reason may be related to the court's statement earlier in the opinion, that "the copyright laws are designed to protect intellectual property, not methods of communication." *Id.* at 411. The court apparently viewed the teletext as a method of communication.

<sup>129</sup>*WGN I*, 523 F. Supp. at 411 (emphasis added).

<sup>130</sup>*Id.* at 413. The term "passive carrier exemption" is sometimes used to refer to section 111(a)(3) and comes from a statement in the legislative history of the Copyright Act: "The general exemption under section 111 extends to secondary transmitters that act solely as passive carriers." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 92, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5706.

The court also pointed out that the carrier's failure to transmit the teletext material might be of interest to the FCC because the carrier's authorization was conditional upon refraining from involvement in the selection of the content of the information that was transmitted over its facilities, but that this was not an issue before the court. 523 F. Supp. at 414.

<sup>131</sup>*WGN II*, 685 F.2d at 222-23.

<sup>132</sup>*Id.* at 221.

<sup>133</sup>*Id.*

retransmit the broadcaster's signal intact is entitled to the section 111(a)(3) exemption.

2. *The EMI Decisions.*—The district court and the circuit court in the *EMI* case were more thorough in the examination of the section 111(a)(3) exemption. Three issues, each raised by the language of the statute, were addressed by each court: (1) Whether the resale carrier had exercised "direct or indirect control over the content or selection of the primary transmission,"<sup>134</sup> (2) Whether the carrier had exercised "direct or indirect control . . . over the particular recipients of the secondary transmission,"<sup>135</sup> and (3) Whether the carrier's "activities with respect to the secondary transmission consist[ed] solely of providing wire, cables, or other communications channels for the use of others."<sup>136</sup> A finding against the resale carrier on any one of the three issues would be sufficient to deny it the benefit of the exemption.

On the first issue, the district court held that the resale carrier had exercised control over the selection of the primary transmission.<sup>137</sup> The resale carrier had originally planned to retransmit the signal of both WOR-TV, New York, and WSBK, Boston. However, only one satellite transponder was available for lease to the carrier, and, based on the results of a market survey, the carrier chose to retransmit the WOR signal. The district court held that this choice constituted control over the selection of the primary transmission.<sup>138</sup> The resale carrier's argument that it should not be held to have selected the primary transmission because the technical impossibility of retransmitting all available television signals had forced the selection was rejected as being "without merit."<sup>139</sup>

On appeal, however, the Second Circuit found a great deal of merit in this argument. The court distinguished the function of the resale carrier of television signals from the function of the ordinary common carrier in that the activities of the former "include carrying the communications desired by receivers rather than those desired by senders."<sup>140</sup> Thus, the court concluded:

When the communication service is technologically limited to one sender . . . a type of "selection" is impelled. That type of forced selection cannot be the type precluded by the statute in the context here presented, for to so hold would be to require that exemption be denied to any carrier that did not

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<sup>134</sup>17 U.S.C. § 111(a)(3) (Supp. V 1981).

<sup>135</sup>*Id.*

<sup>136</sup>*Id.*

<sup>137</sup>*EMI I*, 534 F. Supp. at 537.

<sup>138</sup>*Id.*

<sup>139</sup>*Id.* at 537-38.

<sup>140</sup>*EMI II*, 691 F.2d at 128.

retransmit every television broadcast of every television station in the country.<sup>141</sup>

The circuit court went on to state that control over the content of the primary transmission was the sort of control that the resale carrier must avoid to remain exempt from copyright liability.<sup>142</sup>

On the second issue, the *EMI* district court held that, in contravention of section 111(a)(3), the resale carrier had exercised control over the particular recipients of the secondary transmission.<sup>143</sup> The requisite control was found in the resale carrier's choice of the cable systems with whom it contracted for its resale services.<sup>144</sup> The court rejected the resale carrier's argument that the cable systems' subscribers were the particular recipients of the secondary transmission and that it had no control over those recipients: "EMI only carries the secondary transmission to the CATV headends . . . . The signal received by the subscribing members is transmitted by the CATV systems themselves. Therefore, the recipients of the secondary transmission carried by EMI are the CATV systems, not their subscribing members."<sup>145</sup>

The Second Circuit agreed with the district court that the cable systems were the recipients of the resale carrier's secondary transmission,<sup>146</sup> but, noting that resale carriers differ from traditional common carriers by serving receivers rather than senders,<sup>147</sup> did not equate this circumstance with control over the recipients of its retransmission.<sup>148</sup> The court pointed out that the resale carrier was licensed as a common carrier by the FCC and that

[a]s such, it is bound to furnish its communications services upon reasonable requests. 47 U.S.C. § 201 (a). . . . The record indicates that no reasonable request for its services was ever refused by EMI. EMI has thus not exercised "control over the particular recipients" of its transmissions within the meaning and intent of 17 U.S.C. § 111(a)(3).<sup>149</sup>

Finally, the *EMI* district court held that even if the resale car-

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<sup>141</sup>*Id.* at 130.

<sup>142</sup>*Id.* This is perhaps the weakest part of this decision, because, although the court said that selection could not mean station selection, *id.*, the court never explained what selection did mean. Certainly, selection cannot mean content, because control over that facet of the primary transmission is already expressly forbidden by section 111(a)(3).

<sup>143</sup>*EMI I*, 534 F. Supp. at 538.

<sup>144</sup>*Id.*

<sup>145</sup>*Id.*

<sup>146</sup>*EMI II*, 691 F.2d at 131. *But see id.* at n.13.

<sup>147</sup>691 F.2d at 131.

<sup>148</sup>*Id.*

<sup>149</sup>*Id.*

rier had not exercised control over the selection of the primary transmission and over the particular recipients of the secondary transmission, the resale carrier still would not be entitled to the exemption because its activities went beyond providing channels of communication for the use of others, in contravention of section 111(a)(3).<sup>150</sup> The court found that the resale carrier did not provide channels of communications solely for the use of others but had used those channels itself to actively market a product—the broadcaster's signal.<sup>151</sup> Concerning the resale carrier's marketing practices, the court stated: "It is not the fact that EMI advertises that causes EMI to lose the exemption . . . . It is the fact that the advertisements demonstrate that EMI is, itself, using the wires, etc., it makes available in contravention of the requirement set forth in 17 U.S.C. § 111(a)(3)."<sup>152</sup>

In reversing the district court's decision, the Second Circuit again pointed out that the resale carriers of television signals serve the receivers rather than the senders of secondary transmissions: "[T]he 'others' [for whom the carrier provided wires, cables, and channels] here are the receiving CATV systems which cannot afford their own wires, cables, and channels, rather than the originating senders who use (and cannot afford their own) wires, cables, and channels of more traditional common carriers like a telephone company."<sup>153</sup>

The court rejected the copyright owner's assertion that the resale carrier provided the wires, cables, and channels for its own use because the carrier marketed the copyrighted works, which were contained in the broadcast signal, to the cable systems: "EMI is selling . . . only its transmission services . . . . That it transmits particular signals in response to contracts with its customers specifying those signals, and that it announces to potential customers its ability to transmit those signals, are actions not in conflict with an exempt carrier status."<sup>154</sup>

3. *Analysis.*—Although the Second Circuit's decision in *EMI II* is not binding upon other federal appellate courts that might consider the exemption issue in the future, it is the most authoritative judicial analysis of the section 111(a)(3) exemption.<sup>155</sup> Both of the *WGN* opinions ignored the question of the resale carrier's control over recipients of

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<sup>150</sup>*EMI I*, 534 F. Supp. at 538.

<sup>151</sup>*Id.*

<sup>152</sup>*Id.*

<sup>153</sup>*EMI II*, 691 F.2d at 131.

<sup>154</sup>*Id.*

<sup>155</sup>The authoritativeness of this decision is enhanced by the participation of Judge Markey, chief judge of the United States Court of Customs and Patent Appeals, who wrote the court's opinion. *Id.* at 126. As a patent judge, Judge Markey presumably is more familiar with the principles and policies of patent and copyright law than the average district or circuit court judge.

the secondary transmission and the question of providing wires, cables, and channels of communication for the use of others. However, the language of section 111(a)(3) requires the consideration of these questions. The *WGN* circuit court opinion, therefore, offers very little guidance in interpreting section 111(a)(3) beyond the facts of that particular case.<sup>156</sup>

Although the district court decision in *EMI* fully considered the issues set forth in the exemption, the court seemed blind to the notion that the resale carrier of television signals is no less a common carrier simply because it serves the receivers, rather than the senders, of communications. The Second Circuit made a point of this at every step of its reversal of the district court decision.<sup>157</sup> Indeed, the failure to recognize this concept seems to have been the undoing of the district court's decision.

The soundness of the Second Circuit's decision lies not only in its recognition of the resale carriers of television broadcasts as mere common carriers serving receivers rather than senders, but also in its consistency with federal policy as expressed in the regulations affecting the carriers<sup>158</sup> and with the balance of the public interest.<sup>159</sup> However, the apparent soundness of a decision never guarantees that the next court will accept it as precedent. Thus, the implications of a decision contrary to the Second Circuit's *EMI* decision must be considered.

## VI. IMPLICATIONS OF COPYRIGHT LIABILITY IMPOSED ON RESALE CARRIERS

The most direct result of holding resale carriers of broadcast television signals liable for copyright infringement would be their liability to copyright owners for either actual damages and lost profits,<sup>160</sup> or for statutory damages, which are between \$250 and \$10,000<sup>161</sup> for each and every infringement occurring within the three-year statute of limitations period.<sup>162</sup> Given the number of copyrighted programs retransmitted by resale carriers each day, each week, and each year, the result of such liability could be the total devastation of resale carrier operations.

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<sup>156</sup>The facts of the *WGN* case are distinguishable from the typical resale carrier situation. The typical resale carrier, unlike the carrier in *WGN*, retransmits the broadcaster's signal intact, as is required by FCC regulations.

<sup>157</sup>See *supra* notes 140, 147, 153 and accompanying text.

<sup>158</sup>See *supra* notes 37-73 and accompanying text.

<sup>159</sup>See *supra* notes 74-85 and accompanying text.

<sup>160</sup>17 U.S.C. § 504(b) (Supp. V 1981).

<sup>161</sup>*Id.* § 504(c)(1). In cases of willful infringement, damages up to \$50,000 may be awarded. *Id.* § 504(c)(2).

<sup>162</sup>*Id.* § 507(b).

Further, to avoid future infringement, the resale carrier would be required to obtain consent from the copyright owner before retransmitting any broadcast signal that contained copyrighted programs. The retransmission consent system, however, is fraught with complications. First, a consent requirement imposed upon the resale carriers would be an indirect method for the broadcasters and the copyright owners to freeze the cable industry.<sup>163</sup> If consent were denied to the resale carriers or offered only at a price beyond their means, the cable systems would be unable to import distant television signals.<sup>164</sup> The cable systems' offerings to subscribers would be restricted to local programming, which is already available over the airwaves to home viewers. As a result, the attractiveness of the cable service would be vastly reduced. The competitive attitudes that are held between broadcasters and cable systems<sup>165</sup> and the experiences with the retransmission consent experiment that was conducted between cable systems and copyright owners a decade ago<sup>166</sup> indicate that blanket denials of retransmission rights to resale carriers could be expected, thus, causing the cable industry to wither.

In addition, a retransmission consent system might not result in just compensation to copyright owners, because the increased royalties received from resale carriers in exchange for consent to retransmit could easily be consumed by the costs of negotiating that consent.<sup>167</sup> Alternatively, if the resale carrier is forced to pay the copyright owner for consent to retransmit a copyrighted program, a windfall to the owner could result. The consent payment would be in addition to the fee paid by the broadcaster for rights to show the program and to the compulsory license fee paid by the cable system, even though the number of ultimate viewers would remain unchanged.<sup>168</sup>

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<sup>163</sup>*EMI II*, 691 F.2d at 132. See *Malrite T.V. v. FCC*, 652 F.2d 1140, 1148 n.9 (2d Cir. 1981).

<sup>164</sup>See *EMI II*, 691 F.2d at 132 ("CATV systems served by intermediate carriers cannot provide their full current programming to their subscribers without the services of those carriers").

<sup>165</sup>See *TIME*, Aug. 9, 1982, at 54. ("Playing on the traditional suspicion between broadcasters and cable people, [superstation owner Ted] Turner has launched a direct-mail campaign aimed at arousing cable operators; he enclosed copies of ABC memos counseling local affiliate stations to use every resource . . . to campaign for 'free TV.'").

<sup>166</sup>See *Malrite T.V. v. FCC*, 652 F.2d 1140, 1148 n.9 (2d Cir. 1981). See also *EMI II*, 691 F.2d at 128.

<sup>167</sup>*Cf.* Note, *supra* note 6, at 950 (discussing retransmission consent between copyright owners and broadcasters). However, there is no reason to believe that negotiation costs would be lower if the resale carrier were involved rather than the cable system.

<sup>168</sup>The copyright owners counter the multiple payment argument by asserting that the compulsory license fee does not approach the market value of their programs. *BROADCASTING*, Mar. 22, 1982, at 30. See *EMI II*, 691 F.2d at 133 n.18. The compulsory license fees, however, were set at rates that must be presumed to have been deemed

## VII. CONCLUSION: GETTING THE SIGNALS STRAIGHT

The policies of Congress and the FCC that are expressed in their regulations affecting resale carriers, the balance of public interest considerations, the authoritative judicial interpretation of the present copyright law, and the ominous implications of deviation from that interpretation all favor permitting the resale carriers of broadcast television signals to retransmit those signals to their cable system customers unburdened by copyright liability. However, not one of these factors is binding on any court that might consider this issue in the future, and the permutation from district court to circuit court in the *WGN* and *EMI* decisions indicates that the judiciary has had its signals crossed on how the present copyright law applies to the activities of the resale carriers.

In 1982 Congress had the opportunity to straighten those signals for the courts and for potential litigants. A bill introduced in Congress<sup>169</sup> would have amended section 111(a)(3) of the Copyright Act to ensure that resale carriers of television signals would be covered by the copyright infringement exemption. The amended section would have provided exemption from copyright liability when

(3) the secondary transmission is made by any carrier who has no direct or indirect control over *the content* of the primary transmission, and whose activities with respect to the secondary transmission or over the *ultimate* recipients of the secondary mission [sic] consist *primarily* of providing wires, cables, or other communications channels for the use of others.<sup>170</sup>

The House Committee Report of this bill indicates that it was intended to accomplish by statute what the Second Circuit accomplished judicially; that is, reverse the district court decision in *EMI*. The Report stated:

[A] decision . . . in a case involving an interpretation of [17 U.S.C.] section 111(a)(3), *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, . . . leaves the cable industry in a state of turmoil. . . . In the Committee's view, the decision incorrectly construed the carrier exemption. . . . As a result . . . the entire

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fair by Congress. See *id.* at 132, 133 n.18. Also, the Copyright Royalty Tribunal has authority to adjust the compulsory license rates. 17 U.S.C. § 801(b)(2)(A)-(D) (Supp. V 1981).

<sup>169</sup>H.R. REP. NO. 5949, 97th Cong., 2d Sess. (1982).

<sup>170</sup>*Id.* § 101(a) (emphasis added). To the benefit of copyright owners, the bill also would have established statutorily a limited form of the syndicated program exclusivity rule, *id.* § 101(d). See *supra* note 34. The bill would have benefited the broadcasters by enacting a statutory must-carry rule. H.R. 5949, 97th Cong., 2d Sess. § 201 (1982). See *supra* note 11 and accompanying text.

compulsory licensing scheme [could be] undercut, which would be antiethical [sic] to the intent of this committee and the public interest.

There has never been any doubt by this Committee that carriers are exempt from copyright liability when retransmitting television signals to cable systems via terrestrial microwave or satellite facilities.<sup>171</sup>

The bill would have amended the present section 111(a)(3) to prohibit carrier control over the content of a primary transmission, rather than over content *and* selection, and over the ultimate, rather than particular, recipients of the secondary transmission. In addition, the bill would have required that the resale carrier's activities with respect to the secondary transmission consist primarily, rather than solely, of providing wires, cables, and channels for the use of others.

Had the *WGN* and *EMI* cases been decided under the amended statute, the decision of each court would have been the same. The resale carrier in *WGN* still would have failed to qualify for the exemption because its practice of stripping a portion of the broadcast signal and inserting its own information would have constituted control over the content of the primary transmission. The carrier in *EMI* still would have qualified for the exemption because, as the Second Circuit held, the carrier did not control the content of the primary transmission<sup>172</sup> or the ultimate recipients of the secondary transmission.<sup>173</sup> Although the carriers' activities with respect to the secondary transmission could possibly have been construed as "marketing" the broadcaster's signal, as the copyright owner alleged, those activities consisted *primarily* of providing channels of communication for the use of receivers of the communications, the cable systems.<sup>174</sup> Thus, the apparently contrary holdings of the *WGN* and *EMI* circuit court opinions can be harmonized on the basis of the facts of each case viewed under the proposed section 111(a)(3) amendment.

The benefits to the cable industry in protecting the compulsory license system and to the public interest in guaranteeing continued diversity in cable television programming that would have accrued under the amendment are great. Unfortunately, the bill died when the Senate failed to act on it before the end of the 97th Congress.<sup>175</sup>

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<sup>171</sup>H.R. REP. NO. 559, 97th Cong., 2d Sess. 4-5 (1982). The report was issued prior to the circuit court's *EMI II* decision.

<sup>172</sup>*EMI II*, 691 F.2d at 130. By eliminating the question of control over the selection of the primary transmission, H.R. 5949 would have made unnecessary the weakest part of the circuit court's opinion. See *supra* note 142.

<sup>173</sup>*EMI II*, 691 F.2d at 131. See *id.* at n.13.

<sup>174</sup>*Id.* at 131.

<sup>175</sup>The bill was in Senate hearings as of December 3, 1982. No further action was

In order that those benefits be protected by providing the courts with clear statutory guidance on the question of copyright infringement liability for resale carriers of television broadcasts, a bill guaranteeing the carriers exemption from liability should be reintroduced and passed by the 98th session of Congress. Only then will the signals finally be set straight and kept straight.

STEVEN C. SHOCKLEY

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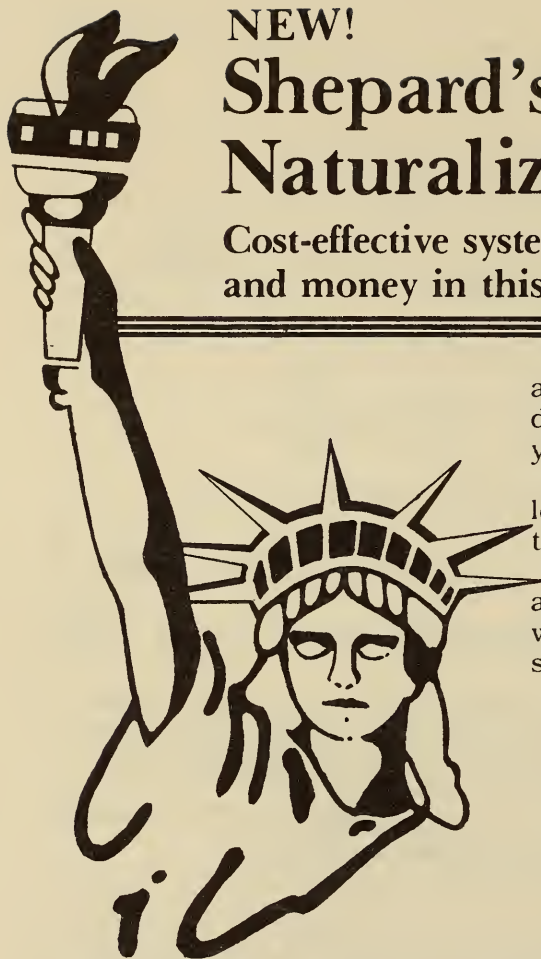
taken before the end of the year. [1981-1982 Transfer Binder] 2 CONG. INDEX (CCH) 34,518 (Dec. 30, 1982). According to a spokeswoman in the copyright section of the House Committee for the Judiciary, there were no plans for a similar copyright amendment to be reintroduced to the Congress in the first six months of 1983.







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